TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908

No. 93.

JOSIAH CODER, TRUSTEE OF THE ESTATE OF ALEXANDER ARMSTRONG, BANKRUPT, APPELLANT,

vs.

WILLIAM ARTS.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED MAY 26, 1908.

(20,726.)

(20,726.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 324.

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vs.

WILLIAM ARTS.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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1 Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1906, of said Court, begun and held at the United States Court House in the City of St. Louis, Missouri, on the first Monday in December, to-wit: the third day of December, A. D. 1906, before the Honorable Walter H. Sanborn, Honorable William C. Hook and Honorable Elmer B. Adams, Circuit Judges.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered, that heretofore, and on the second day of June, A. D. 1905, a transcript of record from the District Court of the United States for the Southern District of Iowa, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, pursuant to an appeal allowed by said District Court in the matter of Alexander Armstrong, Bankrupt, In Bankruptcy, wherein Josiah Coder, Trustee in Bankruptcy of the above named Alexander Armstrong, was appellant, and William Arts, Claimant, was appellee.

That among the pleadings and proceedings embraced in the said transcript of record are the following, to-wit:

Pleas and proceedings and evidence in the District Court of the United States for the Southern District of Iowa, Western [Division] at Council Bluffs, Iowa, before the Honorable Smith, McPherson, Judge, in the Matter of Alexander Armstrong, Bankrupt.

2 In the District Court of the United States for the Southern District of Iowa, Western Division.

In the Matter of ALEXANDER ARMSTRONG, Bankrupt.

In Bankruptcy.

STATE OF IOWA, *Carroll County, ss:*

At Carroll, in said District of Iowa, on the 19th day of August, A. D. 1904, came William Arts of Carroll, in the county of Carroll, in said District of Iowa, and made oath and says: That Alexander Armstrong, the person by whom a petition for adjudication of bankruptcy has been filed, was, at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of $104,880.46.

That the consideration of said debt is as follows: Money borrowed and received by the said Alexander Armstrong and his son

H. Armstrong in part from the said William Arts, with interest thereon, according to five promissory notes of the said Alexander Armstrong, one dated May 19th, 1900, falling due May 19th, 1901, for Twenty-Seven Hundred Dollars ($2700.00), drawing interest at the rate of eight per cent. per annum from maturity; another dated December 26th, 1903, falling due March 26, 1904, for Eighteen Thousand Four Hundred and Fifty-three Dollars ($18,453.00) made by said Alexander Armstrong to William Arts, the same drawing interest at the rate of eight per cent. per annum from maturity; one dated January 29, 1904, falling due January 30, 1905, for Fifty-eight Thousand Eight Hundred and Twenty-six Dollars and Fifty cents ($58,826.50), made by said Alexander Armstrong to William Arts and drawing interest at the rate of eight per cent. per annum from maturity; one made January 29, 1904, falling due on demand, for Twenty Thousand Dollars ($20,000.00) made by said Alexander Armstrong to William Arts and drawing interest at the rate of eight per cent. per annum from date; one dated June 17, 1904, payable on demand for Fifty-five Hundred and Twelve Dollars and Forty Cents ($5,512.40) made by said Alexander Armstrong to William Arts, drawing eight per cent. interest from date. Copies of said notes being attached hereto and marked "Exhibits" one, two, three, four, and five.

That no part of said debt has been paid except endorsements which appear on the back of said notes.

That there are no set-offs or counterclaims to the same and that the only securities held by this deponent for said debt are the following: That mortgage securing the first four notes hereinbefore described was made on the second day [*od*] May 1904, by the said Alexander Armstrong and wife, to the said William Arts, covering the northeast quarter, the northeast quarter of the northwest quarter, and the entire south half of section thirteen, the South half of the South half of Section fourteen, the East half of the Southwest quarter of Section twenty-two, the entire West half, and the West half of the East half, and also the Southwest quarter of the Southeast quarter in section Twenty-three, all of Section Twenty-six, the East half of the East half of Section Twenty-seven the Northeast quarter of the Northeast quarter of Section Thirty-four, the
3 North half of the North half of Section Thirty-five; all the foregoing land being situated in Township Eighty-three North Range Thirty-four. West of the Fifth Principal Meridian, in Carroll County, Iowa, and containing twenty-two hundred and eighty acres by government survey? The note last above described being secured by a mortgage made by Alexander Armstrong and wife on the 17th of June, 1904, to William Arts and covering the South half of the Northwest quarter, and the North half of the Southwest quarter of Section Twenty-eight, and the South half of the Northeast quarter, and the North half of the Southeast quarter and the Northwest quarter, and the Northwest quarter of the Northeast quarter of Section Twenty-nine and all that part of the South half of the Southwest quarter of Section Twenty, lying South and West of the Soldier River, and all that part of the Southwest quarter

of the Southeast quarter of Section Twenty lying South and West of the Soldier river, all situated in Township Eighty-two, North Range Forty-three, West of the Fifth Principal Meridian, in Monona County, Iowa, containing Six Hundred and Fifteen acres and one-half acre.

The deponent in filing his claim herein against the bankrupt does so with the express understanding that he makes no waiver of any portion of his security and expressly reserves said security and every portion thereof to the amount of said claim, including the cost if any, of collecting payment thereof out of said property held as security.

WM. ARTS, *Creditor.*

Subscribed and sworn to before me this 19th day of August, A. D. 1904.

[SEAL.] W. A. ARTS,
Notary Public in and for Carroll County, Iowa.

"EXHIBIT ONE."

54c, Rev. stamps attached.

CARROLL, IOWA, *May* 19, 1900. No. 1125.
$2,700.00.

May 19, 1900, after date we, or each of us, promise to pay to William Arts or order at the German American Bank, Carroll, Iowa the sum of Twenty-seven Hundred Dollars, for value received with interest at eight per cent. per annum, from due, payable annually.

And if not paid at maturity the amount then due shall draw annual interest at the rate of eight per cent. per annum from maturity until paid. The makers, endorsers and guarantors of this
4 not agree to pay a reasonable attorney's fee if this note is collected by attorney or suit, and consent that any justice of the peace may have jurisdiction hereon to the amount of three hundred dollars, and hereby guarantee payment and severally waive presentment for payment, notice of non-payment, protest and notice of [*rpotest*], and diligence in bringing suit against any party hereto, and sureties consent that the time of payment may be extended without notice thereof.

ROBERT ARMSTRONG.
A. ARMSTRONG.

[Poast] Office——.
Due 5/7/04.

"EXHIBIT TWO."

CARROLL, IOWA, *December* 26, 1903. No. 3467.
$18,453.00.

March 26, 1904, after date we, or each of us, promise to pay to William Arts, or order, at the German American Bank, Carroll, Iowa, the sum of Eighteen Thousand Four Hundred Fifty Three

Dollars, for value received, with interest at eight per cent. per annum, from due, payable annually.

And if not paid at maturity the amount then due shall draw interest at the rate of eight per cent. per annum from maturity until paid. The makers, endorsers and guarantors of this note agree to pay a reasonable attorney's fee if this note is collected by attorney or suit and consent that any justice of the peace may have jurisdiction hereon to the amount of three hundred dollars, and hereby guarantee payment and severally waive presentment for payment, notice of non-payment, protest and notice of protest and diligence in bringing suit against any party hereto, and sureties consent that time of payment may be extended without notice thereof.

H. ARMSTRONG,
A. ARMSTRONG,
By W. A. ARTS, *Cashier.*

Post Office ——.
Due 5/17/04.

"EXHIBIT THREE."

No. 3861.

CARROLL, IOWA, *June* 17, 1904. $5512.40.

On demand after date we, or each of us, promise to pay to William Arts or order, at the German American Bank, Carroll, Iowa, the sum of Fifty Five Hundred and Twelve Dollars and Forty cents for value received with interest at five per cent. per annum from date, payable [annuall/y.]

And if not paid at maturity the amount then due shall draw interest at the rate of eight per cent. per annum from maturity until paid. The makers, endorsers and guarantors of this note agree to pay a reasonable attorney's fee if this note is collected by attorney or suit, and consent that any justice of the peace may have jurisdiction hereon to the amount of three hundred dollars, and hereby guarantee payment and severally waive presentment for payment, notice of non-payment, protest and notice of protest, and diligence in bringing suit against any party hereto, and sureties consent that time of payment may be extended without notice thereof.

A. ARMSTRONG.

Post office ——.
Due ——.

Endorsed on bank—5/27/1901, Interest paid and time extended to May 19, 1902.
6/12/1901 Int. Pd. & time extended to May 19,1903.
June 3, 1903, Int. pd. and time extended to May 19, /1904.
Paid $200 May 28, 1904.
Paid 3/25/03, $2,000.00.

"EXHIBIT FOUR."

No. 3591.

CARROLL, IOWA, *January* 29, 1904. $20,000.00.

On demand after date we, or each of us, promise to pay to William Arts or order at the German American Bank, Carroll, Iowa, the sum of Twenty Thousand Dollars, for value received, with interest at eight per cent. per annum, from date, payable annually.

And if not paid at maturity the amount then due shall draw annual interest at the rate of eight per cent. per annum from maturity until paid. The makers, endorsers and guarantors of this note agree to pay a reasonable attorney's fee if this note is collected by attorney or suit and consent that any justice of the peace may have jurisdiction hereon to the amount of three hundred dollars, and [hereby] guarantee payment and severally waive presentment for payment, notice of non-payment, protest and notice of interest and diligence in bringing suit against any party hereto, and consent that time of payment be extended without notice thereof.

A. ARMSTRONG.

Post office ——.
Due ——.

"EXHIBIT FIVE."

CARROLL, IOWA, *January* 29, 1904.

No. 3590. $58,826.50.

January 30, 1905, after date we, or each of us, promise to pay to William Arts or order at the German American Bank, Carroll, Iowa, the sum of Fifty-eight Thousand Eight Hundred
6 and Twenty-six Dollars and Fifty cents, for value with interest at eight per cent. per annum from due, payable annually.

And if not paid at maturity the amount then due shall draw annual interest at the rate of eight per cent. per annum from maturity until paid. The makers endorsers and guarantors of this note agree to pay a reasonable attorney's fee if this note is collected by attorney or suit, and consent that any justice of the peace may have jurisdiction hereon to the amount of three hundred dollars, and hereby guarantee payment, and severally waive presentment for payment, notice of non-payment, protest, notice of protest, and diligence in bringing suit against any party hereto and sureties consent that time of payment may be extended without notice thereof.

A. ARMSTRONG.

Post office ——.
Due ——.

Endorsed: In the District Court of the United States for the Southern District of Iowa, Western Division. In Bankruptcy. In the Matter of Alexander Armstrong, Bankrupt. Proof of Claim of Wm. Arts. Amount of Claim $104,880.46. Filed August 26, A. D. 1904, at 10 o'clock A. M. W. S. Mayne, Referee. Filed Aug. 21, 1905, Wm. C. McArthur, Clerk. By E. J. Maxwell, Deputy.

In the District Court of the United States for the Southern District of Iowa, Western Division.

In the Matter of ALEXANDER ARMSTRONG, Bankrupt.

In Bankruptcy.

Amended Objections to Claim of William Arts.

Now comes Josiah Coder, duly appointed Trustee in the matter of Alexander Armstrong, bankrupt, and files his amended objections to the allowance of the claim filed by Wm. Arts for the reason that the above bankrupt is not indebted to said Arts in the amount claimed, and the notes alleged to have been signed by said bankrupt do not evidence the true amount due said Arts from said bankrupt. Your trustee however is unable to state the exact amount due said Arts from said bankrupt, and therefore requests that strict proof be required from said Arts as to the amount actually due him from said bankrupt, and that he be required to produce any and all books and papers belonging to him or to the German-American
7 Bank of Carroll, Iowa, which may throw light on the transactions had between the bankrupt and said William Arts or German-American Bank, and tend to prove the exact amount justly due from said bankrupt to said William Arts.

In this connection your trustee alleges that the note for $18,453.00, dated December 25th, 1903, due March 26th, 1904; and signed by H. Armstrong and A. Armstrong referred to in the claim of William Arts, was the primary note and obligation of Henry Armstrong, and the bankrupt signed said note merely as surety for Henry Armstrong, and is liable, if at all, on said note only as surety; and said note should not, in any event, be allowed as a claim against the estate of the above named bankrupt until the estate of Henry Armstrong has been exhausted and all due and proper credits arising from his estate credited thereon.

Your trustee further alleges that the note for $2700.00 dated May 19th, 1900, due May 19th, 1901, and signed by Robert Armstrong and A. Armstrong, referred to in the claim of William Arts, was the primary note and obligation of Robert Armstrong and the bankrupt signed said note merely as surety for Robert Armstrong, and is liable, if at all, on said note as surety only; and said note should not, in any event, be allowed as a claim against the estate of the above bankrupt until the estate of Robert Armstrong has been exhausted and all due and proper credits arising from his estate credited thereon.

Your trustee further denies the validity and force of each and both of the mortgages referred to in the claim of said William Arts, for the reasons:

First. That said mortgages, and each of them, were made and given to secure a pre-existing indebtedness within four months prior to the filing of the voluntary petition in bankruptcy by the above named bankrupt, and on which petition said bankrupt was adjudged a bankrupt.

Second. That on May 2nd, 1904, and at all times thereafter the aggregate of the bankrupt's property was not, at a fair valuation, sufficient in amount to pay his debts.

Third. That on May 2nd, 1904, and at all times thereafter the said bankrupt was insolvent, which said fact was known to said bankrupt on said day, and at all times thereafter.

Fourth. That on May 2nd, 1904, and at all times thereafter, the above named claimant, William Arts, or his agents and employees, knew that the aggregate of the property of the above named bankrupt was not, at a fair valuation, sufficient in amount to pay
8 his debts, and that said bankrupt was insolvent; or said William Arts, and his agents and employees, had knowledge of such facts regarding the financial condition of the above named bankrupt on May 2nd, 1904, and at all times thereafter, as would have put a prudent and careful man on inquiry, which said inquiry, if made, would have disclosed that the said bankrupt was insolvent on said date.

Fifth. That the mortgage of May 2nd, 1904, and the mortgage thereafter given by the said bankrupt to said William Arts, were given with the intent and purpose by the said bankrupt, to prefer said William Arts over all other creditors of said bankrupt.

Sixth. That the aforesaid William Arts, or his agents acting in the taking of the mortgages hereinbefore referred to, had reasonable cause to believe that the bankrupt intended thereby to give a preference.

Seventh. That each and both of the mortgages given by the bankrupt to said William Arts were made and given by said bankrupt within four months prior to the filing of the petition in bankruptcy under which he was adjudicated a bankrupt, with the intent and purpose on his part to hinder, delay or defraud his creditors.

Wherefore your trustee hereby expresses his wish to avoid said mortgages and each of them for the reason that they, and each of them, are illegal, null and void under the provisions of the bankrupt act now in force; and your trustee prays that said mortgages, and each of them, may be declared illegal, null and void, and be forever canceled and set aside.

JOSIAH CODER,
Trustee of Alexander Armstrong, Bankrupt.
By M. L. LEARNED,
GEO. W. PAINE.

STATE OF IOWA, *County of Pottawattamie, ss:*

M. L. Learned, being first duly sworn, on *other* deposes and says he is one of the attorneys for Josiah Coder, Trustee of Alexander Armstrong, bankrupt; that he knows the statements contained in the foregoing amended objections to the claim of William Arts, and that said facts and matters of law therein stated are true, as affiant verily believes.

M. L. LEARNED.

Subscribed in my presence and sworn to before me this — day of January, 1905.

W. S. MAYNE,
Referee in Bankruptcy.

9 Endorsed: Amended Objections to [*Calim*] of William Arts. Filed Feb'y 15, 1905, at 1:30 o'clock P. M. W. S. Mayne, Referee. Filed Aug. 21, 1905. Wm. C. McArthur, Clerk. By E. J. Maxwell, Deputy.

In the District Court of the United States for the Southern District of Iowa, Western Division.

In the Matter of ALEXANDER ARMSTRONG, Bankrupt.

In Bankruptcy.

In the Matter of the Claim of WILLIAM ARTS against said Bankrupt Estate.

To Hon. Smith McPherson, Judge:

The undersigned referee of your Court in compliance with your annexed order would respectfully report herewith the evidence taken upon the claim of William Arts against said estate with findings of facts established by same. In addition to the evidence hereto attached and taken herein, the evidence taken upon the claim of Thos. McPherson against said estate is to be considered herein as far as applicable, which said evidence has been returned and is on file herein.

All of which is respectfully submitted.

W. S. MAYNE, *Referee.*

In the District Court of the United States for the Southern District of Iowa, Western Division.

In the Matter of ALEXANDER ARMSTRONG, Bankrupt.

In Bankruptcy.

Alexander Armstrong, engaged principally in farming was, upon his own petition, filed July 27, 1904, on the 6th day of August A. D. 1904 adjudged bankrupt.

His schedules fixed the value of his assets:

Real Estate	$182,400.00
Personal Property	8,410.00
	$190,810.00
Exempt property, Homestead	$6,000
Personalty	1,500
	$7,500

The real estate listed consisted of what is termed his old farm of 2360 acres and 80 acres near Glidden, a farm of 615 acres in Monona County and a town lot in Glidden. His homestead consisted of four lots in Glidden where he resides.

10 His liabilities are scheduled—

Secured claims, wages to laborers	$405.00
Mortgages	207,144.81
Unsecured	45,853.20
Accommodation paper	26,800.00
	$280,203.01
On the 29th day of Sept. 1904, he amended his schedule of liabilities, adding personal liabilities aggregating	$1,430.00
Addition- accommodation liabilities	12,702.00
Making his total liabilities	$294,308.01

Of the mortgage indebtedness, $13,000 is of long standing.

On part of his large or old farm and $26,900 on different parts of his land, payments of which he assumed as part of the purchase price therefor. The other mortgages were all made within a period of four months prior to proceedings herein.

The aggregate of the debts proved against the estate and admitted as correct without interest, amounts to $261,497.47

The mortgages above named & not proved & not including interest	39,900.000
Labor claims	405.00
Total liabilities	$301,792.47

On the 26th day of August claimant filed, as a secured claim herein, proof of debt against bankrupt's estate upon five promissory notes; one dated May 19th, 1900 for $2,700 signed by Robert Armstrong, bankrupt and one dated Dec. 26th 1903 for $18,000 and signed by Harry Armstrong and bankrupt, two dated Jan. 29, 1904, one for $20,000, the other for $58,826.50 signed by bankrupt, and one dated June 17, 1904 for $5,512.40 signed by bankrupt.

He claims the first four notes above are secured by a mortgage, executed by bankrupt and his wife on the 2nd of May, 1904 upon 2,280 acres of land in Carroll County and the other by a mortgage executed June 17, 1904 on 615 acres in Monona County, and asks that his liens be established and his said claims be 1st paid out of the proceeds of the sale of said lands.

The Trustee filed objections to said claim controverting the amount and denying the validity of said mortgages.

11 Alleging that as to the first two notes, bankrupt was only security, and that the property of the principals should be exhausted before claimant can participate herein.

The trustee denies the validity and force of the mortgages for the reasons:

That they were given to secure a pre-existing indebtedness within four months prior to the filing of the petition herein, and that at the date of their execution and at all times thereafter the aggregate of the bankrupt's property was not at a fair valuation sufficient in amount to pay his debts.

That, at the date of the execution thereof, bankrupt was insolvent which fact was known to said bankrupt on said date and at all times thereafter.

That claimants or his agents and employees knew that bankrupt was insolvent and had knowledge of such facts regarding his financial conditions as would have put a prudent and careful man upon inquiry, which if made, would have disclosed that bankrupt was at that time insolvent.

That the mortgages were given by bankrupt with intent and purpose on his part to prefer claimant.

That claimant or his agents acting for him, had reasonable cause to believe that the bankrupt intended thereby to give a preference, that the said mortgages were given by bankrupt within four months prior to the filing of the petition in bankruptcy, under which he was adjudicated bankrupt with the intent and purpose on his part to hinder, delay or defraud his creditors.

Facts.

1st. The evidence shows that claimant is and was a banker at Carroll Iowa; that prior to 1898 he owned a half interest in the German Bank of Carroll, Iowa and bankrupt had an account with that bank and was a borrower there. Claimant's son, W. A. Arts, was assistant cashier of that bank. In 1898, claimant closed out his interest in the German Bank and started the German American Bank with his son W. A. Arts, as cashier who the evidence shows did all the business with the bankrupt. Bankrupt at once became a borrower at claimant's bank still keeping his account with the older bank. In 1900, he owed the German Bank over $26,000.00, which it refused to carry without security, and he borrowed of claimant $20,000, to aid him in payment of his said indebtedness and moved his account to claimant's bank, after which he increased his indebtedness to claimant by additional loans and interest

12 accruing on his indebtedness until on January 30, 1903, it reached the sum of $68,905.40 evidenced by five notes. On

that date new notes were made for said indebtedness as follows One for $50,905, due January 30, 1904, and one for $16,000, due in four months. On the 7th. day of July 1903, the $16,000, note was renewed, interest added in, and enough money loaned to make it $20,993.92.

On the 29th day of January, 1904, these notes were renewed as follows: The interest on the large notes for past year and interest for year in advance, were added making the amount $58,826.50, and was made due on January 30, 1905, and the other the interest and enough of the principal paid by check to reduce it to $20,000, for which the note was taken payable on demand. On May the 2nd. one of the mortgages was given to secure the above two notes and two notes bankrupt had signed as security. One in 1900, with Robert Armstrong; and one December 1903, with Henry Armstrong.

The other mortgage in question was given June 17, 1904, to secure a note made for overdraft at bank. The last item of which was money applied on taxes June 6, 1904.

1*a*. Bankrupt was on the 2nd day of May 1904, the date of the execution of the first mortgage in controversy, and at all times thereafter hopelessly insolvent, although he insisted to his creditors that if time was given him he could pay up everything. He knew he was insolvent and intended by the giving of the mortgage referred to which was intended to cover practically all his real estate to secure the claimant in the payment of this whole claim represented by the four notes which up to that time were unsecured there is no evidence showing that claimant or his agents acting therein, knew at the time of taking the first mortgage, May 2, 1904, that bankrupt was insolvent; on the contrary they all testify they did not know it, nor did they make any inquiry as to his financial condition. The mortgage was made at their earnest solicitations. The evidence does not show that they had before taking the mortgage on May 2nd reasonable cause to believe that it was intended by the giving of said mortgage to give to claimant a preference, unless the solicitations by claimant for the same can be construed as reasonable cause.

2nd. At the time the second mortgage was given, June 17, 1904, bankrupt was hopelessly insolvent and knew he was insolvent. The mortgage was given for a pre-existing indebtedness, and was
13 intended as a preference to claimant and at the time it was given those acting for claimant knew that bankrupt was insolvent and had reasonable cause to believe that it was intended by the giving of the mortgage to give a preference.

1*c*. There was due on the four notes for which the mortgage of May the 2nd was given, at the date of filing petition herein principal and interest, with interest computed as provided by [Sec.] 63 of Bankrupt Act $95,704.24. There was due on the note given June 17th, 1904 at date of filing Petition herein $5,524.65.

W. S. MAYNE,
Referee in Bankruptcy.

In the District Court of the United States for the Southern District of Iowa, Western Division.

In the Matter of the Estate of ALEXANDER ARMSTRONG, Bankrupt.

In Bankruptcy.

Petition for Review.

Now comes Josiah Coder, Trustee of the Estate of Alexander Armstrong, bankrupt, and files this his petition and respectfully represents:

First. That heretofore, to-wit: On the 6th. day of August, 1904, the aforesaid Alexander Armstrong, who before that time had been engaged principally in farming in Carroll County, Iowa, was duly adjudged a bankrupt by W. S. Mayne, Esq., Referee, of said court, under and by virtue of a petition in bankruptcy filed by the aforesaid Armstrong on the 27th. day of July 1904, and that afterward your petitioner was chosen and elected trustee of the above entitled estate, and duly qualified as such trustee, and is now, and ever since has been acting as such trustee.

Second. That on or about the 6th day of August 1904, the matter of the estate of Alexander Armstrong, bankrupt, was referred to W. S. Mayne, Esquire, Referee in Bankruptcy, by the clerk of the District Court of the United States for the Southern District of Iowa, all as provided by the Bankrupt Act.

Third. That heretofore, to-wit: On the 26th. day of August 1904, William Arts, a resident and citizen of Carroll County, Iowa, filed a claim against said estate in the sum of $104,880.46, alleging that said claim was a preferred claim against said estate, for the amount therein set forth, by virtue of two certain real estate mortgages, made, executed and delivered by the aforesaid bankrupt to said William Arts, claimant, one of said mortgages bearing date May 2nd, 1904, and covering twenty-two hundred and eighty acres of land in Carroll County, Iowa, and purporting to secure $98503.32, the other bearing date June 17th, 1904, and covering six hundred and fifteen acres of land in Monona County, Iowa, and purporting to secure $5512.40. It was alleged by the said William Arts that said real estote mortgages constituted liens on the land therein described.

14 Fourth. That said claimant petitioned said Referee, that said claim be allowed as a preferred claim, and that the trustee be ordered to pay the same out of the proceeds of the sale of the land covered by the mortgages aforesaid, and that said claim, and the mortgages securing the same have preference over all other claims against said estate; that your petitioner, as trustee, on the 2nd. day of January 1905, filed his amended objections to the allowance of said claims, and denied the right of said claimant to be paid out of the proceeds of the sale of the land covered by the mortgages aforesaid, as a preferred creditor, and expresses his wish, as such trustee, to avoid said mortgages, and each of them.

Fifth. That afterwards the said claim came on to be heard before the said Referee, and testimony was taken before him by depositions and the matter submitted to him on or about the 16th day of February, 1905; and on said day your petitioner requested said referee to make the following findings of fact in he matter of said claim.

Finding as to date when A. Armstrong filed petition in bankruptcy, and date when he was declared bankrupt.

Finding as to amount of A. Armstrong's liabilities and value of his assets on May 2nd. 1904.

Finding as to amount of value of property owned by him on that date, which was and has been declared exempt.

Finding that A. Armstrong was insolvent, and knew he was insolvent on May 2nd, 1904.

Finding that A. Armstrong intended to prefer Wm. Arts by the giving of the mortgages of May 2nd. 1904, and June 17th, 1904.

Finding that William Arts or W. A. Arts, his son, and cashier of the bank owned by William Arts, knew A. Armstrong was insolvent on May 2nd, 1904, and June 17th, 1904, or had knowledge of such facts on said days as to put a prudent man on inquiry, and said inquiry, if prosecuted, would have developed the fact that A. Armstrong was hopelessly insolvent.

Finding that William Arts' mortgage was given to secure a pre-existing unsecured indebtedness and covered substantially all of A. Armstrong's property.

Finding that William Arts had reasonable cause to believe that the mortgages of May 2nd, 1904, and June 17th, 1904, and each of them, were intended to give him a preference over any other creditors.

15 Finding that William Arts' mortgages of May 2nd, 1904, and June 17th, 1904, and each of them, should be set aside and held invalid.

Sixth. That long after the matter of said claim had been submitted to said referee, and your petitioner had requested the findings above set forth, Hon. Smith McPherson, Judge of said Court, without any application being made therefor, and without notice to your petitioner, or his attorneys, entered an order of which the following is a copy:

"In the District Court of the United States for the Southern District of Iowa, Western Division.

In the Matter of the Estate of ALEXANDER ARMSTRONG, a Bankrupt.

Order.

The Referee W. S. Mayne, Esq., will take the evidence and make findings of fact as to the claims of William Arts, and Thomas B. McPherson, and report said evidence and said findings of fact to the

Court with all reasonable speed, but will make or adopt no conclusions of law.

Done this March 21, 1905.

SMITH McPHERSON, *Judge.*

March 21, 1905.

The clerk will enter the above order of record.

SMITH McPHERSON, *Judge.*"

That neither your petitioner nor his attorneys knew that said order had been made or entered until after it was signed and entered as aforesaid.

Seventh. That on the 21st day of August, 1905, the said referee made and entered a report and order relative to the claim of the said William Arts, the same being now on file in said Court.

Eighth. That your petitioner claims that the said Referee erred in not determining the validity or invalidity of the claim of said Arts, and in not adjudicating as to the validity or invalidity of his pretended liens under and by virtue of the said real estate mortgages: In this connection your petitioner respectfully represents that he has been advised by counsel that the order entered by the Hon. Smith McPherson, Judge as aforesaid, under date of March 21st, 1905, is of doubtful validity, for the reason,
16 among others, that the matters of the estate of the above named bankrupt had been referred to said referee, and therefore all proceedings therein, except such as were required by the statute or general orders to be had before the Judge, could be had before the referee only.

Ninth. That your petitioner claims that the said referee erred in not finding the amount of the bankrupt's liabilities, and the value of his estate, on May 2nd. 1904.

Tenth. That your petitioner claims that the said referee erred in not finding that the said bankrupt intended to prefer said claimant by the giving of the mortgage of May 2nd. 1904.

Eleventh. That your petitioner claims that the said referee erred in not finding that the claimant or W. A. Arts, his son, knew that the bankrupt was insolvent on May 2nd. 1904, or had knowledge of such facts on said day as to put a prudent man on inquiry.

Twelfth. That your petitioner claims that said referee erred in not finding that claimant's mortgages were given to secure a pre-existing, unsecured indebtedness, and covered substantially all of the bankrupt's property.

Thirteenth. That your petitioner claims that said referee erred in not finding that said claimant had reasonable cause to believe that the mortgage of May 2nd. 1904, was intended to give him a preference over other creditors.

Fourteenth. That your petitioner claims that said referee erred in not finding that the claimant's mortgages of May 2nd. 1904, and June 17th. 1904, and each of them, should be set aside and held invalid.

Fifteenth. That your petitioner claims that said referee erred

in making the following finding: "There is no evidence showing that claimant or his agents, acting therein, knew at the time of taking the first mortgage, May 2, 1904, that bankrupt was insolvent."

Sixteenth. That your petitioner claims that the said referee erred in making the following finding: "The evidence does not show that they had before taking the mortgage of May 2nd. reasonable cause to believe that it was intended by the giving of said mortgage to give to claimant a preference unless the solicitations by claimant for the same can be construed as reasonable cause."

17 Seventeenth. Your petitioner therefore avers that the findings of fact of the referee, as hereinbefore set forth in paragraphs fifteen and sixteenth of this petition, constituted error, for the reason that they and each of them are contrary to the evidence.

Eighteenth. Your petitioner further avers that the referee erred in failing to make each and every of the findings requested by your petitioner, as stated in his request, and in paragraphs eight to fourteenth inclusive of this petition, because such findings were proper and material and warranted by the evidence introduced.

Nineteenth. Your petitioner further represents that the referee erred in not making and returning his conclusions of law touching the validity or invalidity of said mortgages, and erred in not disallowing the same.

Twentieth. Your petitioner desires a review by the Judges of this court of the report and order made by said referee, and the proceedings had before him, and files this his petition therefor, and he prays that the errors complained of, and the questions raised before the referee decided and not decided, by him, may be certified by said referee to the Hon. Smith McPherson, District Judge: That the said Judge may review said report, order and proceedings, and make and enter such orders as may be necessary and proper to grant to your petitioner such relief as by law and the practice of the Court he may be entitled to; and the petitioner particularly prays that the said claim of William Arts be disallowed, and that said mortgages may be held to be void and of no force or effect, and no lien on the mortgaged premises.

JOSIAH CODER, *Trustee,*
By M. L. LEARNED,
GEORGE W. PAINE,
Attorneys.

UNITED STATES OF AMERICA,
Southern District of Iowa,
Western Division, Pottawattamie County, ss:

I, Josiah Coder, the petitioner mentioned in the foregoing petition, do hereby make a solemn oath that the statements therein are true, according to the best of my knowledge information and belief.

JOSIAH CODER.

Subscribed and sworn to before me, this 29 day of August, 1905.
[SEAL.] ALICE T. SCAHILL,
Notary Public.

Endorsed: In the District Court of the United States for the Southern District of Iowa Western Division. In the Matter of the Estate of Alexander Armstrong Bankrupt. In Bankruptcy. Petition for Review. Filed 11 o'clock A. M. Aug. 29, 1905, Wm. C. McArthur, Clerk, By E. J. Maxwell, Deputy.

18 In the District Court of the United States for the Southern District of Iowa, Western Division.

In the Matter of ALEXANDER ARMSTRONG, a Bankrupt.

No. 601. In Bankruptcy.

In the Matter of the Claim of WILLIAM ARTS.

Final Decree.

Now on this 7th. day of April 1906, it being one of the days of the March 1906 term of this court, this cause and claim comes on for final determination, on the claim of the claimant William Arts, filed before the referee, the objections and Amended Objections of Josiah Coder, the Trustee herein, filed before the referee, the findings made by the referee herein, and the evidence returned in connection therewith, the petitions for review filed by the Claimant and the Trustee, this cause and claim having been heretofore fully argued and submitted by the counsel for the respective parties, and the Court now files in open Court its Opinion herein, which by reference is hereby referred to for a more detailed statement of the history and details of the transactions herein below referred to, and the Court being sufficiently advised in the premises, and counsel for said parties being now present in open court it is hereby ordered that all findings of the Referee W. S. Mayne are hereby set aside, to which order the Trustee aforesaid excepts, and the Court finds as follows:

First. That a number of years ago Alexander Armstrong the bankrupt herein, came to Carroll County, Iowa, from Illinois. That he became the possessor of about 2500 acres of land in said county, and was engaged in the business of farming, and buying and fattening and selling cattle. His reputation for integrity and financial responsibility stood high in the community, he being reputed to be worth over $200,000.00. He was a friend of the Claimant William Arts, for many years, did his banking business with a bank in Carroll, Iowa in which Arts was interested, and in the year 1900, shortly after Arts organized a private bank of his own in Carroll, called the German-American Bank, Armstrong transferred his account to that bank, and became a large borrower from him, and so continued until the time of the transactions hereinafter referred to. Armstrong was able to read printed characters, but written ones with difficulty, if at all.

19 Second. That during the Spring of 1904, said William Arts was taken seriously ill; his life was despaired of, and one of his sons, Frank Arts, was summoned to Carroll from Nebraska, where he was engaged in the mercantile business. Frank Arts remained at his father's home in Carroll for some time, and in company with his brother, W. A. Arts, who was cashier of the father's bank, looked over the notes and securities belonging to the bank. By this time Armstrong's indebtedness had grown to a very large sum, and the notes held by the bank signed by him as principal on surety aggregated in the neighborhood of $95,000.00. That it was agreed between the brothers W. A. Arts and Frank Arts that it was not good business policy to have such a large indebtedness against one man unsecured, and they thereupon asked for and procured from Armstrong a mortgage on 2280 acres of his Carroll County land, to secure said debt. This mortgage was given on May 2, 1904, and is one of those assailed by the Trustee as an unlawful preference. That William Arts, who was then convalescent, was advised of what had been agreed on and done, ratified the transaction, and himself took the mortgage to the office of the Recorder of the County, and had it recorded therein. To which [*which*] findings [—] and each of them except: "This mortgage was given on May 2, 1904, and is one of those assailed by the Trustee as an unlawful preference" the Trustee excepts.

Third. That subsequent to the giving of said mortgage Arts continued business with Armstrong, the latter drawing checks on Arts' Bank, thereby creating an overdraft aggregating about $3,000.00, which, with other indebtedness, amounted on June 17, 1904, to $5,512.40, and on that date Armstrong gave Arts another mortgage to secure that sum on 615 acres of land in Monona County, which is the second of the mortgages contested by the trustee herein.

Fourth. That at the time of the taking of said mortgages on May 2, 1904, there was owing from the said Alexander Armstrong to the said William Arts the following sums of money evidenced by the four notes described below, three of which were past due at said time, and one of which was not due, to-wit:

One note dated December 26, 1903, for $18,453.00, due March 26, 1904, interest paid to said time, and $2,000.00, paid on said date, leaving balance due on March 26, 1904, $16,453.00.

One [*note*], dated January 29, 1904, payable on demand, for $20,000.00.

20 One note dated January 29, 1904, for $58,826.50 due January 30, 1905, interest paid to said time, making due at said last named date said amount of $58,826.50.

One note dated May 19, 1900, for $2,700.00, due May 19, 1901, interest paid and time extended to May 19, 1904, and $200 paid on principal, making balance due May 19, 1904, $2,500.00.

That all of said notes provided that if they were not paid at maturity the amount then due should draw annual interest at the rate of eight per cent. per annum from maturity until paid, and the makers, endorsers and guarantors agreed to pay a reasonable attorneys' fee if the note should be collected by attorney or suit.

Fifth. That there is now due and owing on said notes with interest computed at the rate of eight per centum per annum to the 26th day of August 1904, the sum of $97,497.40, principal and interest. And said claim to the amount set forth in this paragraph are hereby established. To which finding and conclusion and each thereof the Trustee excepts.

Sixth. That the said mortgage given by Armstrong to Arts on May 2, 1904, covered and included the following described real estate, situated in the County of Carroll and State of Iowa, to-wit:

The Northeast quarter, the Northeast quarter of the Northwest quarter, and the entire South half of Section Thirteen (13) 520 acres; the South half of the South half of Section Fourteen (14) 160 acres; the East half of the Southeast fourth of Section Twenty-two (22) the entire West half, and the West half of the East half, also the Southeast quarter of Southeast quarter of Section Twenty-three (23) 520 acres; all of Section Twenty-six (26) 640 acres; the East half of the East half of Section Twenty-seven (27) 160 acres; the Northeast quarter of the Northeast quarter of Section Thirty-four (34) 40 acres; also the North half of the North half of Section Thirty-five (35) 160 acres; all the foregoing land being situated in Township Eighty-three (83) North Range Thirty-four (34) West Fifth Principal Meridian, containing in all 2280 acres by government survey, more or less.

Seventh. That the said mortgage given by Armstrong to Arts on June 17, 1904, to secure said indebtedness of $5,512.40 covered and included the following described real estate, situated in the County of Monona and State of Iowa, to-wit:

21 The South half of the Northwest quarter, and the North half of the Southwest quarter of Section Twenty-eight (28), and the South half of the Northeast quarter and the North half of the Southeast quarter, and the Northwest quarter, and the Northwest quarter of the Northeast quarter of Section Twenty-nine (29) and all that part of the South half of the Southwest quarter of Section Twenty (20) lying South and West of the Soldier River, and all that part of the Southwest quarter of the Southeast quarter of Section Twenty (20) lying South and West of the Soldier River, all being situated in Township Eighty-two (82) North Range Forty-three (43) West Fifth P. M. in Monona County, Iowa, containing 615 1/2 acres, more or less, according to United States survey.

Eighth. That on May 2, 1904, and at all subsequent dates Alexander Armstrong, the bankrupt, was in fact insolvent.

Ninth. That on July 27, 1904, said Alexander Armstrong, filed in this court his petition in voluntary bankruptcy, and on August 6th. 1904 was adjudicated a bankrupt by this court.

Tenth. That the said mortgage of May 2, 1904, of Armstrong to Arts was given to secure the above described notes which evidenced an indebtedness existing at that time and prior to that time, and was not given to secure an indebtedness contracted at that time and for a present consideration, but on the contrary was given to secure a pre-existing, unsecured indebtedness. That at said time the said Armstrong actually owed the said Arts the amounts

evidenced by the terms of said respective notes, and to the said notes neither Armstrong nor the Trustee has any defense, in whole or in part, nor any set-off, counter-claim, or cross-demand. To which findings and each of them, after the words: "That at said time" the Trustee excepts.

Eleventh. That said mortgage of May 2, 1904, on the land in Carroll County above described, was given to secure the aforesaid pre-existing unsecured indebtedness. That said mortgage was wholly free from fraud, and was neither given, taken or received with any intent to cheat, hinder, delay, or defraud creditors or any others. That there was no agreement nor promise to keep the said mortgage from the official and public records. To which findings and each of them, the Trustee excepts.

Twelfth. That at the time of the giving of the said mortgage towit: on May 2, 1904, the said Armstrong did not know that he was insolvent, nor did he intend to prefer the said Arts
22 over any other creditor, nor did he, by the giving of said mortgage intend thereby to give a preference; nor did said Armstrong intend that said Arts should thereby be enabled to obtain a greater percent. of his claim than any other creditor would receive. That at said time, neither the said Arts nor any of his agents knew that the said Armstrong was then insolvent nor had any knowledge of his insolvency, nor had reasonable cause to believe that the said Armstrong was then insolvent, and that at the time of the giving of said mortgage neither the said Arts nor any of his agents had reasonable cause to believe that it was intended thereby to give a preference, nor that said Armstrong, by the giving of said mortgage, intended thereby to give a preference, or intended to enable Arts to obtain a greater percentage of his debt than any other creditor of the same class of Armstrong would be paid or receive, nor did the said Arts or any of his agents, at the time of the taking of said mortgage, have any knowledge with reference to the true financial condition or otherwise of the said Armstrong, such as would have put an ordinarily prudent man upon inquiry, from which the said Arts or his agents could or should have discovered that the said Armstrong was at the time in fact insolvent. Nor could the said Arts, nor any of his agents by the exercise of reasonable diligence and prudence have discovered such facts as would have disclosed the actual financial condition of said Armstrong. To which findings and each of them, the Trustee excepts.

Thirteenth. That the said mortgage of May 2, 1904, under and according to the laws of the State of Iowa, was a good, valid, and [enforceable] one on the property therein described and not voidable by the Trustee in bankruptcy herein, or void for any reason, and the same should be and is hereby sustained in all respects. To which findings and each of them the Trustee excepts.

Fourteenth. That the note of June 17, 1904, for $5,512.40 by the said Armstrong to the said Arts, was given as an evidence of an indebtedness in that sum at that time owing by said Armstrong to the said Arts, and not for a present consideration at the time of the giving thereof, and that the mortgage above referred to, securing

the same, was given to secure said prior indebtedness, existing at and before said time. That said mortgage was free from actual fraud, and there was no purpose on the part of either party to hinder, cheat, delay, or defraud creditors or any others.

Fifteenth. That when the said Arts took the said mortgage last referred to of June 17, 1904, he had reasonable cause to be-
23 lieve that such mortgage and the enforcement thereof would result in his receiving a greater percentage of his said debt of $5,512.40, than any other creditors of said Armstrong of the same class would receive.

Sixteenth. That said mortgage of June 17, 1904, given under the circumstances as above, was voidable at the election of the Trustee in Bankruptcy herein, and is hereby declared by this Court to be null, void, and of no force and effect; and

It is therefore hereby ordered, adjudged and decreed, that the said claim of William Arts, on account of the four notes referred to in the Fourth Finding of Facts herein, and secured by the said mortgage of May 2, 1904, be and the same are established against the Trustee and estate of Alexander Armstrong, bankrupt, and the said notes and the mortgage securing the same, are hereby declared to have been a good, valid and [enforceable] lien on the property described in said mortgage from the time of the giving and recording of said mortgage down to the time when said property was sold by the Trustee in Bankruptcy herein, under order of this Court, discharged and free and clear of all liens, and are now a good, valid, and [enforceable] lien on the proceeds of the sale of said land in the hands of the Trustee. To which said order, adjudication and decree, and each part thereof, the Trustee excepts.

It is further ordered, adjudged and decreed that the said claims of the said William Arts on account of said four notes aggregating principal and interest the sum of $97,497.40 as found in the Fifth Finding of Fact, herein to be paid in full to the said William Arts, Claimant, by the Trustee out of the funds and moneys in his hands by him received on account of the sale of the lands covered by said mortgage and hereinbefore described, after the payments of all prior liens and claims thereon as determined by this Court. To which said order, adjudication and decree, and each part thereof, the Trustee excepts.

It is further ordered, adjudged and decreed that the note and claim of $5,512.40 referred to in the Fourteenth Finding of Fact herein, be, and the same is hereby, established as against the Trustee and the estate, and that as to said claim the said William Arts will participate in said estate as a general creditor. To which said order, adjudication and decree, and each part thereof, the Trustee excepts.

24 It is further Ordered, Adjudged and Decreed that the said mortgage of June 17, 1904, given to secure said claim of $5,512.40, be not enforced, but is hereby set aside, cancelled and held for naught, and treated as though never given, and the Claimant Arts takes nothing under the mortgage.

As to that part of the Findings, Order and Decree, placing the

said William Arts in the position of a general creditor only, as to his said claim of $5,512.40, and cancelling and declaring void the mortgage securing the same, he, the said Arts, excepts and in open court prays for an appeal which is allowed and his supersedeas bond is fixed at $4,000.00.

As to all findings, Orders, Adjudications and Decrees hereinbefore specifically excepted to by Josiah Coder Trustee said Trustee in open, renews his exceptions and prays for the allowance of an appeal in open Court, which is hereby allowed. No supersedeas bond is required. And Claimant excepts to refusal of Court to allow interest after August 26, 1904, Claimant prays an appeal in open court and appeal is allowed.

Done in open court this April 7, 1906.

(Sgd.) SMITH McPHERSON, *Judge.*

Endorsed: Filed April 7, 1906, Wm. C. McArthru, Clerk, By E. J. Maxwell, Deputy.

In the District Court of the United States for the Southern District of Iowa, Western Division.

In the Matter of ALEXANDER ARMSTRONG, Bankrupt.

In the Matter of the Claim of WILLIAM ARTS.

Petition for Appeal.

Now comes Josiah Coder, the Trustee in Bankruptcy of the above named Alexander Armstrong, and conceiving himself to be aggrieved by the order and decree made and entered in the above entitled cause by this Court on the 7th day of April, 1906, does hereby appeal from said order and decree to the United States [Sircuit] Court of Appeals for the Eighth Circuit for the reasons, specified in the assignment of errors herewith filed by him, the said Trustee, and he prays that this appeal may be allowed, and that a transcript of the record proceedings and papers upon which said order was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Eighth Circuit.

M. L. LEARNED,
GEORGE W. PAINE,
Attorneys for Josiah Coder, Trustee.

Dated April 7th, 1906.

In Bankruptcy of ALEXANDER ARMSTRONG, Bankrupt.

The foregoing claim of appeal is allowed.

(Sgd.) SMITH McPHERSON,
District Judge.

Dated April 7th, 1906.

Endorsed: In the matter of Alexander Armstrong, Bankrupt. In the Matter of the Claim of William Arts. Petition for Appeal. Filed April 7, 1906. Wm. C. McArthur, Clerk, By E. J. Maxwell, Deputy.

25 That after the filing and docketing of the transcript of record from said District Court the following proceedings, among others, were had and done in the said United States Circuit Court of Appeals for the Eighth Circuit, to-wit:

(*Appearance of Mr. J. P. Conner and Mr. P. E. C. Lally as Counsel for Appellee.*)

On the fifth day of June, A. D. 1906, the appearance of Mr. J. P. Conner and Mr. P. E. C. Lally, as counsel for appellee, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2451.

JOSIAH CODER, Trustee, &c., Appellant,
vs.
WILLIAM ARTS.

The Clerk will enter my appearance as Counsel for the Claimant or Defendant in Error.

J. P. CONNER.
P. E. C. LALLY.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2451. Josiah Coder, Trustee &c., Appellant, *vs.* William Arts. Appearance. Filed Jun. 5, 1906, John D. Jordan, Clerk. J. P. Conner, P. E. C. Lally, Counsel for Appellee.

(*Appearance of Mr. M. L. Learned as Counsel for Appellant.*)

And on the sixth day of June, A. D. 1906, the appearance of Mr. M. L. Learned, as counsel for appellant, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2451.

26 JOSIAH CODER, Trustee of the Estate of Alexander Armstrong, Bankrupt, Appellant,
vs.
WILLIAM ARTS.

The Clerk will enter my appearance as Counsel for the Appellant.

M. L. LEARNED.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2451. Josiah Coder, Trustee &c., Appellant, *vs.* William Arts. Appearance. Filed Jun. 6, 1906, John D. Jordan, Clerk. M. L. Learned, Counsel for Appellant.

(*Appearance of Mr. John N. Baldwin and Mr. George S. Wright as Counsel for Appellee.*)

And on the eighth day of September, A. D. 1906, the appearance of Mr. John N. Baldwin and Mr. George S. Wright, as counsel for appellee, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2451.

JOSIAH CODER, Trustee, &c., Appellant,
vs.
WILLIAM ARTS.

The Clerk will enter my appearance as Counsel for the Appellee.
JOHN N. BALDWIN.
GEO. S. WRIGHT.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2451. Josiah Coder, Trustee &c., Appellant, *vs.* William Arts. Appearance. Filed Sep. 8, 1906, John D. Jordan, Clerk. John N. Baldwin, George S. Wright, Counsel for Appellee.

27 (*Order of Argument.*)

And on the eighteenth day of December, A. D. 1906, in the record of the proceedings of said Circuit Court of Appeals is an order of argument in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1906.

No. 65, Orig.

TUESDAY, *December* 18, 1906.

On Petition for Review.

In re JOSIAH CODER, Trustee, Petitioner,

and

No. 2451.

JOSIAH CODER, Trustee, Appellant,
vs.
WILLIAM ARTS.

Appeal from the District Court of the United States for the Southern District of Iowa.

These causes having been called for hearing in their regular order, argument was commenced by Mr. M. L. Learned in behalf

of the petitioner and appellant and continued by Mr. John N. Baldwin for the respondent and appellee, but the hour of adjournment having arrived before the conclusion thereof, the further hearing of these causes was postponed until tomorrow morning.

(*Order of Submission.*)

And on the nineteenth day of December, A. D. 1906, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1906.

No. 65, Orig.

WEDNESDAY, *December* 19, 1906.

On Petition for Review.

In re JOSIAH CODER, Trustee, etc., Petitioner,

28 and

No. 2451.

JOSIAH CODER, Trustee, etc., Appellant,
vs.
WILLIAM ARTS.

Appeal from the District Court of the United States for the Southern District of Iowa.

These causes having been called this day for further hearing argument was continued by Mr. John N. Baldwin for the respondent and appellee and concluded by Mr. M. L. Learned for the petitioner and appellant.

Thereupon these causes were submitted to the Court upon the record and the transcript of record from said District Court and the briefs of counsel filed herein.

(*Decree.*)

And on the third day of April, A. D. 1907, in the record of the proceedings of said Circuit Court of Appeals is a decree in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1906.

WEDNESDAY, *April* 3, 1907.

No. 2451.

JOSIAH CODER, Trustee of the Estate of Alexander Armstrong, Bankrupt, Appellant,

vs.

WILLIAM ARTS.

Appeal from the District Court of the United States for the Southern District of Iowa.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Iowa, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, affirmed with costs, except as modified relative to the question of interest upon the petition for review, *In Re* William Arts, Petitioner, No. 74 Original, which was submitted and decided herewith; and that William Arts have
29 and recover against Josiah Coder, Trustee of the estate of Alexander Armstrong, Bankrupt, the sum of twenty dollars for his costs herein, and that the same be allowed and paid by the Trustee, out of any funds in his hands, as a part of the cost of the administration of said Bankrupt's estate.

APRIL 3, 1907.

(*Order to File Findings of Fact and Conclusions of Law Nunc Pro Tunc.*)

And on the twenty-ninth day of April, A. D. 1907, in the record of the proceedings of said Circuit Court of Appeals is an order to file Findings of Fact and Conclusions of Law *nunc pro tunc* as of April 3, 1907, in said cause, which said order is in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1906.

MONDAY, *April* 29, 1907.

No 2451.

JOSIAH CODER, Trustee, etc., Appellant,

vs.

WILLIAM ARTS.

Appeal from the District Court of the United States for the Southern District of Iowa.

In this cause the Court having made certain findings of fact and conclusions of law, it is now here ordered that such findings and

conclusions be, and they are hereby, directed to be filed *nunc pro tunc* as of April 3, 1907.

(*Findings of Fact and Conclusions of Law by Circuit Court of Appeals.*)

And on the twenty-ninth day of April, A. D. 1907, the Findings of Fact and Conclusions of Law by Circuit Court of Appeals was filed in said cause by order of the Court as of April 3, 1907, in the words and figures following, to-wit:

30 United States Circuit Court of Appeals, Eighth Circuit.

No. 2451.

JOSIAH CODER, Trustee of the Estate of Alexander Armstrong, Bankrupt, Appellant,
vs.
WILLIAM ARTS, Appellee.

Findings of Fact and Conclusions of Law.

Pursuant to general order in bankruptcy No. 36 the court makes and files the following findings of fact and conclusions of law:

Findings of Fact.

1. Alexander Armstrong filed a voluntary petition in bankruptcy on July 27, 1904, in the District Court of the United States for the Southern District of Iowa and was adjudged a bankrupt thereon on August 6, 1904.

2. For many years prior to May 2, 1904, he had been engaged principally in farming in Carroll County, Iowa, and on that day he owned a tract of 80 acres of land and a tract of 2360 acres of land in that county, 616½ acres of land in Monona County, a residence and business lot in Glidden, Iowa, 200 or 300 head of cattle, 30 horses, a large number of hogs and some farm machinery. Mortgages which amounted to about $18,000 had been recorded against a part of the land in Carroll County and the land in Monona County had been traded for in April, 1904, and taken subject to one-half of a mortgage for $40,000. All of the other property was free from incumbrance. But the residence in Glidden was his homestead and exempt from execution.

3. William Arts was the sole owner of a state bank in Carroll, Iowa, which he opened in 1898 and his son W. A. Arts was the cashier. In June, 1898, the bank commenced loaning money to Armstrong and continued to loan moneys to him in amounts varying from $20,000 to a few hundred dollars at a time and to
31 renew old loans until on May 2, 1904, Armstrong owed Arts $98,503.32 evidenced by notes and $2000 evidenced by an

overdrawn account in the bank. This indebtedness had been increasing steadily from June, 1898, by reason of the new loans and the accrual of interest. Armstrong first opened an account in Arts' bank in April, 1900. Prior to that time he had kept an account in another bank in Carroll in which Arts had owned a large interest up to the time he opened his own bank in 1898.

4. Armstrong had the reputation of being one of the wealthiest men in Carroll County and no security had been required of, or given by him to Arts until May 2, 1904, when he gave a mortgage on 2360 acres of his land in Carroll County to secure the payment of $98,503.32 evidenced by his notes and this mortgage was recorded on May 3, 1904. It was executed at the request of the cashier of the bank or at the request of his brother who had been called home by reason of the serious illness of their father William Arts.

5. Armstrong was insolvent on May 2, 1904, when he gave the mortgage to Arts and he then knew that he was insolvent.

6. Neither Arts nor any of his agents acting therein knew or had reasonable cause to believe that Armstrong was insolvent when he gave the mortgage of May 2, 1904, nor did Arts or any of his agents acting therein then have reasonable cause to believe that it was intended thereby to give him a preference over other creditors by the execution of that mortgage.

7. Armstrong did not make the mortgage of May 2, 1904, with any intent or purpose on his part to hinder, delay or defraud his creditors or any of them.

8. There is due to the appellee on the notes secured by the mortgage of May 2, 1904, with interest to March 1, 1906, the sum of $109,107.56, and this amount should be paid to appellee by the appellant out of the funds and moneys in his hands which he received on account of the sale of the lands covered by that mortgage.

Conclusions of Law.

1. The mortgage of May 2, 1904, is not voidable by the trustee under section- 60*a* and 60*b* of the bankruptcy law, because
32 neither Arts nor any of his agents acting therein had reasonable cause to believe that it was intended thereby to give a preference.

2. The mortgage of May 2, 1904, is not null or void as against the creditors of the mortgagor, Armstrong, under section 67*e* because it was not made with the intent or purpose on his part to hinder, delay or defraud his creditors, or any of them.

3. The giving of the mortgage of May 2, 1904, to Arts did not as a matter of law constitute any evidence of any intent on the part of the bankrupt to hinder, delay or defraud other creditors within the meaning of section 67*e*, notwithstanding the fact that its necessary effect was to hinder and delay other creditors and to deprive them of an opportunity they might otherwise have had to collect larger portions of their claims.

4. The mortgage of May 2, 1904, though given within four months of the adjudication in bankruptcy to secure a pre-existing

unsecured indebtedness was valid and the appellee should be paid $109,107.56 out of the proceeds of the sale of the mortgaged property.

(Endorsed:) No. 2451. Josiah Coder, Trustee &c., Appellant, *vs.* William Arts. Findings of Fact and Conclusions of Law by Circuit Court of Appeals. Filed by order of Court Apr. 29, 1907, as of April 3, 1907, John D. Jordan, Clerk.

(*Petition for Appeal to Supreme Court of United States.*)

And on the thirtieth day of April, A. D. 1907, a petition for appeal to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

The United States Circuit Court of Appeals, Eighth Circuit.

No. 2451.

JOSIAH CODER, Trustee of the Estate of Alexander Armstrong, Bankrupt, Appellant,
vs.
WILLIAM ARTS, Appellee.

Petition for Appeal to the Supreme Court of the United States.

33 The above named appellant, Josiah Coder, Trustee of the Estate of Alexander Armstrong Bankrupt, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Eighth Circuit, and that a judgment and decree was rendered therein on the 3rd day of April, A. D. 1907, affirming the decree of the District Court of the United States for the Southern District of Iowa, allowing the claim of appellee and establishing the same as a lien on the land described in the mortgage given appellee except as said decree was ordered revised and modified by directing the payment of One Hundred and Nine Thousand, One Hundred and Seven and 56/100 Dollars, ($109,107.56), instead of Ninety-seven Thousand Four Hundred Ninety-seven and 40/100 Dollars, ($97,497.40); that the matter and amount in controversy in said suit exceeds the sum of Two Thousand Dollars ($2000.00) besides costs; that this cause is one in which the United States Circuit Court of Appeals for the Eighth Circuit has final jurisdiction, and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal, under the provisions of Section 25 of the United States Bankruptcy Law.

Wherefore the said appellant prays that an appeal be allowed him in the above entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit to send the record and proceedings in said cause, with all things concerning

the same, to the Supreme Court of the United States, in order that the errors complained of, and the assignment of errors herewith filed by the said appellant, may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

JOSIAH CODER,
Trustee of the Estate of Alexander Armstrong, Bankrupt,
By M. L. LEARNED,
JOHN L. KENNEDY,
GEORGE W. PAINE,
Attorneys.

(Endorsed:) No. 2451. The United States Circuit Court of Appeals, Eighth Circuit. Josiah Coder, Trustee of the Estate of Alexander Armstrong, Bankrupt, Appellant, *vs.* William Arts,
34 Apellee. Petition for Appeal to the Supreme Court of the United States. Filed Apr. 30, 1907, John D. Jordan, Clerk.

(*Assignment of Errors.*)

And on the thirtieth day of April, A. D. 1907, an assignment of errors was filed in said cause, in the words and figures following, to-wit:

The United States Circuit Court of Appeals, Eighth Circuit.

No. 2451.

JOSIAH CODER, Trustee of the Estate of Alexander Armstrong, Bankrupt, Appellant,
vs.
WILLIAM ARTS, Appellee.

Assignment of Errors.

Now comes Josiah Coder, Trustee of the Estate of Alexander Armstrong, Bankrupt, appellant, and says that in the decree entered herein April 3rd, 1907, and in the record and proceedings herein, there is manifest error; and that the United States Circuit Court of Appeals for the Eighth Circuit erred in this, to-wit:

First. In holding, deciding and decreeing that William Arts, Appellee, did not have reasonable cause to believe that there was an intention to give him a preference over other creditors of the bankrupt, by the execution and delivery to him by said bankrupt of the mortgage of May 2nd, 1904.

Second. In holding, deciding and decreeing that the bankrupt did not make and deliver to Appellee, the mortgage of May 2nd, 1904, with the intent or purpose on his part to hinder, delay, or defraud his creditors or any of them.

Third. In holding, deciding and decreeing that the mortgage executed and given by the bankrupt to Appellee on May 2nd, 1904, was not voidable by the Trustee because the Appellee did not have

reasonable cause to believe that there was an intention to give a preference.

Fourth. In holding deciding and decreeing that the mortgage of May 2nd, 1904, executed and given by the bankrupt to the
35 Appellee, was not voidable by the Trustee because the bankrupt had no intent or purpose on his part to hinder, delay, or defraud his creditors, or any of them.

Fifth. In holding, deciding and decreeing that the mortgage of May 2nd, 1904, executed and given by the bankrupt to Appellee, within four months of adjudication in bankruptcy, to secure a pre-existing, unsecured debt, was not voidable by the trustee.

Sixth. In holding, deciding and decreeing that the mortgage of May 2nd, 1904, executed and given by the bankrupt to the Appellee, was free from actual and intended fraud and from any purpose to affect other creditors injuriously.

Seventh. In holding, deciding and decreeing that the execution and giving of the mortgage of May 2nd, 1904, by the bankrupt to the Appellee does not evidence any intent on the part of the bankrupt to hinder, delay or defraud his creditors or any of them within the meaning of section 67*e* of the Bankruptcy Act.

Eighth. In not holding, deciding and decreeing that the mortgage of May 2nd, 1904, executed and given by the bankrupt to the Appellee was voidable by the Appellant.

Ninth. In holding, deciding and decreeing that the decree of the District Court should be in all things affirmed except as revised and modified as to the matter of interest.

Tenth. In holding, deciding and decreeing that the claim of Appellee should be allowed in the sum of One Hundred Nine Thousand, One Hundred Seven and 56/100 Dollars, ($109,107.56).

Eleventh. In holding, deciding and decreeing that the claim of Appellee should be paid in full to said Appellee by the Appellant out of the funds and moneys in his hands which he received on account of the sale of the lands covered by the mortgage of May 2nd, 1904, executed and given by the bankrupt to the Appellee after the payment of prior liens and claims.

Twelfth. In holding, deciding and decreeing that the costs of this action should be recovered by Appellees against the Appellant.

Wherefore the Appellant prays that said judgment and de-
36 cree of said Circuit Court of Appeals may be reversed in all things, and that he may have an adjudication and decree in his favor.

JOSIAH CODER,
Trustee of the Estate of Alexander Armstrong, Bankrupt.
By M. L. LEARNED,
JOHN L. KENNEDY,
GEORGE W. PAINE,
Attorneys.

(Endorsed:) No. 2451. The United States Circuit Court of Appeals, Eighth Circuit. Josiah Coder, Trustee of the Estate of Alexander Armstrong, Bankrupt, Appellant, *vs.* William Arts, Appellee. Assignment of Errors. Filed Apr. 30, 1907, John D. Jordan, Clerk.

(*Order Allowing Appeal.*)

And on the thirtieth day of April, A. D. 1907, an order allowing an appeal to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

The United States Circuit Court of Appeals, Eighth Circuit.

No. 2451.

JOSIAH CODER, Trustee of the Estate of Alexander Armstrong, Bankrupt, Appellant,
vs.
WILLIAM ARTS, Appellee.

Order Allowing Appeal.

It is hereby ordered that the appeal in the above entitled cause, to the Supreme Court of the United States, be, and is hereby, allowed as prayed.

WALTER H. SANBORN,
United States Circuit Judge, Eighth Circuit.

(Endorsed:) No. 2451. The United States Circuit Court of Appeals, Eighth Circuit. Josiah Coder, Trustee of the Estate of Alexander Armstrong Bankrupt, Appellant *vs.* William Arts, Appellee. Order allowing appeal. Filed Apr. 30, 1907, John D. Jordan, Clerk.

37 (*Citation and Waiver of Service.*)

And on the seventh day of May, A. D. 1907, a citation, with the waiver of service endorsed thereon, was filed in said cause, the original of which is hereto attached and herewith returned:

38 The United States Circuit Court of Appeals, Eighth Circuit.

THE UNITED STATES OF AMERICA, *Eighth Circuit:*

To William Arts:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the city of Washington, in the District of Columbia, thirty (30) days after the date of this citation, pursuant to an appeal allowed and filed in the Clerk's office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein Josiah Coder, Trustee of the Estate of Alexander Armstrong Bankrupt is appellant, and you are appellee, to show cause if any there be, why the judgment and decree rendered against the said appellant as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Walter H. Sanborn Judge of the United States Circuit Court of Appeals for the Eighth Circuit, this 30 day of April, A. D. 1907.

WALTER H. SANBORN,
Circuit Judge, United States Court of Appeals, Eighth Circuit.

Service of citation waived and appearance entered.
May 6th, 1907.

JOHN N. BALDWIN,
Att'y for William Arts.

39 [Endorsed:] No. 2451. The United States Circuit Court of Appeals, Eighth Circuit. Josiah Coder, Trustee of the Estate of Alexander Armstrong, Bankrupt, Appellant, *vs.* William Arts, Appellee. Citation. Filed May 7, 1907. John D. Jordan, Clerk.

40 (*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript contains full, true and complete copies of the Claim of William Arts and exhibits thereto; the Amended Objections to the claim of Arts; the Report of the Referee and finding of facts; the Petition of the Trustee for review of the findings of fact by the Referee; the Order of Reference to the Referee; the Findings of Fact and Decree of the District Court; the Petition of the Trustee for appeal and Order allowing same, and the following pleadings and proceedings in the United States Circuit Court of Appeals, viz:—the Appearances for the Appellant and Appellee respectively; the Order of Argument; the Order of Submission; the Decree; the Findings of Fact and Conclusions of Law; the Petition for Appeal, the Assignment of Errors and the Order allowing an appeal to the Supreme Court of the United States in a certain cause lately depending in said Circuit Court of Appeals, wherein Josiah Coder, Trustee of the Estate of Alexander Armstrong, Bankrupt, was Appellant, and William Arts, was Appellee, as full, true and complete as the originals of the same now remain on file and of record in my office.

I do hereby further certify that the original citation with the waiver of service indorsed thereon is hereto attached and herewith returned.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this seventeenth day of May, A. D. 1907.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 20,726. U. S. circuit court appeals, 8th circuit. Term No. 324. Josiah Coder, trustee of the estate of Alexander Armstrong, bankrupt, appellant, *vs.* William Arts. Filed May 22d, 1907. File No. 20,726.

THE UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States to the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Whereas, in a certain suit in said Circuit Court of Appeals between Josiah Coder, Trustee of the estate of Alexander Armstrong, bankrupt, appellant, and William Arts, appellee, which suit was removed to the Supreme Court of the United States by virtue of an appeal, agreeably to the act of Congress in such case made and provided, there appears to be a diminution of the record and proceedings of said cause, to wit:

The assignment of errors upon which the Trustee appealed from the order and judgment of the District Court to the Circuit Court of Appeals is omitted from said transcript.

You, therefore, are hereby commanded that, searching the record and proceedings in said cause, you certify what omissions, to the extent above enumerated, you shall find, to the said Supreme Court of the United States, so that you have the same, together with this writ, before the said Supreme Court forthwith.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 25th day of February, A. D. 1909.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Return to Writ.

UNITED STATES OF AMERICA,
Eighth Circuit, ss:

In obedience to the command of the within writ of certiorari, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the assignment of errors filed in the District Court of the United States for the Southern District of Iowa, as certified in the transcript of the record from said Court in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereto subscribe my name, and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-seventh day of February, A. D. 1909.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

[Endorsed:] File No. 20,726. Supreme Court U. S. October Term, 1908. Term No. 93. Josiah Coder, Trustee, *vs.* William Arts. Writ of certiorari. Filed Feb. 27, 1909. John D. Jordan, Clerk.

In the District Court of the United States for the Southern District of Iowa, Western Division.

In the Matter of ALEXANDER ARMSTRONG, Bankrupt.

In Bankruptcy.

In the Matter of the Claim of WILLIAM ARTS.

Assignment of Errors.

Now on this 7th day of April, 1906, comes Josiah Coder, Trustee in Bankruptcy of the above named Alexander Armstrong, and files the following assignment of errors, upon which he will rely on his appeal from the order and decree made by this Honorable Court on the 7th day of April, 1906, in the above entitled matter, and assigns as error and alleges that said order and decree was erroneous, and against the just rights of the said Josiah Coder, Trustee in Bankruptcy, for the following reasons:

First. That the evidence showed that at the time the bankrupt gave the mortgage of May 2nd, 1904, he was insolvent and said mortgage was taken by the said Arts to secure a pre-existing *undsecured* indebtedness, within four months prior to the filing of the petition in bankruptcy in this matter, and said mortgage has been avoided by said Trustee, and was and is void, and should have been so held by the Court.

Second. That the Court erred in setting aside all findings of the Referee.

Third. That the Court erred in not sustaining the findings of the Referee, that the Bankrupt knew he was insolvent on May 2nd, 1904.

Fourth. That the Court erred in finding that William Arts was seriously ill, and his life despaired of, during the Spring of 1904, and that the mortgage of May 2nd, 1904, for Ninety-eight Thousand Five Hundred Three and 32/100 Dollars ($98,503.32) was taken by the sons of said Arts, because of his physical condition.

Fifth. That the Court erred in finding that neither the Bankrupt or the Trustee had any defense to the claim of William Arts.

Sixth. That the Court erred in finding that the mortgage of May 2nd, 1904, was wholly free from fraud, and was neither given, taken or received, with any intent to cheat, hinder, delay or defraud creditors, or any others, and that there was no agreement or promise to keep the mortgage from the official and public records.

Seventh. That the Court erred in finding that at the time of the giving of the mortgage of May 2nd, 1904, the bankrupt did not know he was insolvent.

Eighth. The Court erred in finding that the bankrupt did not intend to prefer William Arts over any other creditor at the time of the giving of the mortgage of May 2nd, 1904.

Ninth. That the Court erred in finding that neither Arts nor any of his agents, knew that the bankrupt was insolvent, on May 2nd, 1904, or had knowledge of such facts as would have put an ordinarily prudent man on inquiry, which inquiry, if prosecuted, would have disclosed the fact that the aforesaid Armstrong was then bankrupt.

Tenth. That the Court erred in finding that the mortgage of May 2nd, 1904, was a good, valid, and enforcible mortgage on the property covered thereby, and not voidable by the Trustee in Bankruptcy, or void for any reason.

Eleventh. That the Court erred in finding that the mortgage of May 2nd, 1904, should be and is sustained in all respects.

Twelfth. That the Court erred in decreeing that the Claim of the said Arts on account of the four notes purported to be secured by the mortgage of May 2nd, 1904, was a good, valid and enforcible lien on the property described in said mortgage.

Thirteenth. That the Court erred in decreeing that the claim of the said Arts on account of the four notes described in the mortgage of May 2nd, 1904, was a good, valid, and enforcible lien on the proceeds of sale of the land described in said mortgage.

Fourteenth. That the Court erred in decreeing that the claim of the said Arts, on account of the said four notes covered by the mortgage of May 2nd, 1904, should be paid in full out of the funds in the hands of the Trustee, derived from the sale of the land covered by said mortgage.

Wherefore the said Josiah Coder, Trustee, prays that said decree be reversed, and the claim of William Arts disallowed as a preferred claim, and that the said Court may be directed to enter a decree in accordance with the law and facts as shown by a transcript of the record, proceedings, and papers upon which the decree complained of was rendered.

M. L. LEARNED,
GEORGE W. PAINE,
Attorneys for Josiah Coder, Trustee.

(Endorsed:) In the District Court of the United States for the Southern District of Iowa, Western Division. In the Matter of Alexander Armstrong, Bankrupt. In Bankruptcy. In the Matter of the Claim of William Arts. Assignment of Errors. Filed April 7, 1906. Wm. C. McArthur, Clerk. By E. J. Maxwell, Deputy.

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the above and foregoing contains a full, true and complete copy of the assignment of errors as certified in the transcript of the record from the District Court of the United States for the Southern District of Iowa, by the Clerk thereof, in the case of Josiah Coder, Trustee of the Estate of Alexander Armstrong, Bankrupt, Appellant, *vs.* William Arts, No.

2451, as full, true and complete as the same now remains on file and of record in my office as a part of the said certified transcript of record.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-seventh day of February, A. D. 1909.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

[Endorsed:] File No. 20,726. Supreme Court U. S. October Term, 1908. Term No. 93. Josiah Coder, Trustee, Appellant, *vs.* William Arts. Writ of certiorari and return. Filed March 1st, 1909.

Supreme Court of the United States

October Term, 1907.

No. 324.

JOSIAH CODER, TRUSTEE OF THE ESTATE OF ALEXANDER ARMSTRONG, BANKRUPT, *Appellant.*

vs.

WILLIAM ARTS.

Appeal From the United States Circuit Court of Appeals for the Eighth District.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

Alexander Armstrong filed a voluntary petition in bankruptcy on July 27th, 1904, in the District Court of the United States for the Southern District of Iowa, and was adjudged a bankrupt thereon, August 6th, 1904. (Record, p. 26).

Subsequently Josiah Coder was appointed trustee, and qualified as required by law.

On August 26th, 1904, William Arts filed a claim for $104,880.46 against the estate of the bank-

rupt, based on five promissory notes: One in the sum of $2,700.00, dated May 19th, 1900, due May 19th, 1901; one in the sum of $18,453.00, dated December 26th, 1903, due March 26th, 1904; one in the sum of $20,000.00, dated January 29th, 1904, due on demand; one in the sum of $58,826.50, dated January 29th, 1904, due January 30th, 1905; and one in the sum of $5,512.40, dated June 17th, 1904, due on demand.

It was alleged in the claim filed, that the first four notes above described were secured by a real estate mortgage bearing date May 2nd, 1904, covering 2,280 acres of land in Carroll county, Iowa, and the last note by a real estate mortgage bearing date June 17th, 1904, covering 615½ acres of land in Monona county, Iowa.

The claimant asked that his claim be allowed and the mortgages established as liens against the real estate therein described.

No further mention need be made of the note and mortgage last referred to, because they are no longer involved in this controversy.

The trustee filed amended objections, attacking the mortgage of May 2nd, 1904, and the notes secured thereby, on the grounds: That the bankrupt was not indebted to the claimant in the amount named; that two of the notes were not the primary

obligations of the bankrupt, but were signed merely as surety for his sons; that the mortgage was given to secure a pre-existing, unsecured indebtedness, within four months of adjudication in bankruptcy; that at the time of the giving of the mortgage, and at all times thereafter, the aggregate of the property of the bankrupt was not at a fair valuation sufficient in amount to pay his debts, and he was insolvent; that the claimant, or his agents, knew of the bankrupt's condition, or had knowledge of such facts as would put them on inquiry; that the mortgage was given with the intent and purpose to prefer claimant; that claimant, or his agents, had reasonable cause to believe a preference was intended; and that the mortgage was made and given within four months of adjudication in bankruptcy, with the intent and purpose to hinder, delay, or defraud creditors. Wherefore the trustee asked that the mortgage be avoided and set aside. (Record, pp. 6, 7).

Testimony was taken before W. S. Mayne, Referee, who made findings of fact only, and therefore entered no order of allowance or disallowance. (Record, pp. 8-11).

The trustee and the claimant both filed petitions for review, and a hearing was then had before Hon. Smith McPherson, District Judge, who entered a decree allowing the claim of Arts in the sum of

$97,497.40, and ordered the trustee to pay that amount out of the proceeds of the sale of the land covered by the mortgage of May 2nd, 1904. (Record, pp. 16, 21).

The trustee appealed from this decree to the Circuit Court of Appeals, and that Court was of the opinion that Arts had a valid claim against the bankrupt, and was entitled to retain his security, and sustained the decree of the lower Court, except that the claim was allowed in the sum of $109,107.56 instead of in the sum of $97,497.40. (Record, pp. 25, 27).

An appeal was then sued out to this Court.

The evidence is conflicting as to the knowledge or want of knowledge of the claimant as to the financial condition of the bankrupt on May 2nd, 1904. For the purpose of the present hearing, however, the facts as found by the Court of Appeals may be stated as follows:

For many years prior to May 2nd, 1904, the bankrupt had been engaged principally in farming in Carroll county, Iowa, and on that date he owned two tracts of land in that county, one of 80 acres, and the other of 2,360 acres; a tract of land in Monona county, Iowa, of 616½ acres; a residence and business lot in Glidden, Iowa; two or three hun-

dred head of cattle; 30 horses; a large number of hogs; and some farm machinery. (Record, p. 26).

Mortgages aggregating about $18,000.00 were of record against the Carroll county land, and the Monona county land had been traded for, in April, 1904, subject to one-half of a $40,000.00 mortgage. All of the other property of the bankrupt was free from incumbrance. The residence in Glidden, however, was his homestead and exempt. (Record, p. 26).

Arts, the claimant, was the sole owner of a state bank in Carroll, Iowa, which he opened in 1898. In June of that year the bank commenced loaning money to the bankrupt, and continued to make loans to him in amounts varying from $20,000.00 down to a few hundred dollars at a time, and to renew old loans, until on May 2nd, 1904, the bankrupt owed claimant $98,503.32, evidenced by notes, and a $2,000.00 overdraft. This indebtedness had been increasing steadily from June, 1898, by reason of new loans, and the accrual of interest. (Record, pp. 26, 27).

On May 2nd, 1904, the bankrupt, at the request of the cashier of the bank, gave a mortgage on the 2,360-acre tract in Carroll county, to secure the payment of notes aggregating $98,503.32, which mortgage was recorded the next day. (Record, p. 27).

At the time of the giving of this mortgage, the bankrupt was insolvent, and then knew that he was insolvent. (Record, p. 27).

The claimant had never required or received security from the bankrupt prior to May 2nd, 1904. (Record, p. 27).

Neither the claimant nor any of his agents acting for him knew or had reasonable cause to believe, that the bankrupt was insolvent when he gave the mortgage of May 2nd, 1904, nor did the claimant, or any of his agents acting for him, then have reasonable cause to believe that it was intended thereby to give a preference over other creditors. (Record, p. 27).

The bankrupt did not make the mortgage of May 2nd, 1904, with any intent or purpose on his part to hinder, delay or defraud his creditors, or any of them, but as a fact, its necessary effect was to hinder and delay other creditors, and to deprive them of an opportunity they might otherwise have had to collect larger portions of their claims. (Record, p. 27).

The questions involved in the case for determination are three:

First. Is not the intent and purpose to hinder, delay or defraud creditors to be presumed from the

giving of the mortgage of May 2nd, 1904, when its necessary effect was to so hinder, delay or defraud them?

Second. Conceding that the claimant had no knowledge of the bankrupt's true financial condition on May 2nd, 1904, is not the mortgage void under the provisions of Section 67-e of the Bankrupt Act?

Third. Is not the amount allowed claimant by the Court of Appeals excessive?

SPECIFICATIONS OF ERROR.

The appellant respectfully insists that the decree is erroneous in the following particulars:

First. In affirming the decree of the District Court except as to amount allowed.

Second. In decreeing that there is due the claimant $109,106.56.

Third. In not decreeing that the mortgage of May 2nd, 1904, is null and void as against the creditors of the bankrupt, under Section 67-e of the present Bankrupt Act.

Fourth. In decreeing that the giving of the mortgage of May 2nd, 1904, to Arts, did not, as a matter of law, constitute any evidence of any intent on the part of the bankrupt to hinder, delay or de-

fraud other creditors, within the meaning of the *aforesaid Section 67-e, notwithstanding the fact* that its necessary effect was to hinder and delay other creditors, and to deprive them of the opportunity they might otherwise have had to collect larger portions of their claims.

Fifth. In decreeing that the mortgage of May 2nd, 1904, though given within four months of adjudication in bankruptcy by an insolvent, to secure a pre-existing, unsecured indebtedness, was valid.

Sixth. In decreeing that this claimant should be paid $109,106.56, out of the proceeds of sale of the mortgaged property.

BRIEF OF THE ARGUMENT.

It has been contended by counsel for the claimant throughout this litigation that Section 67-e of the Bankrupt Act has no application to this case for the reason that no intent and purpose has been shown on the part of the bankrupt to hinder, delay or defraud creditors by the giving of the mortgage of May 2nd, 1904, and for the further reason that Section 60-a-b, which deals with preferences, is alone applicable.

On the other hand, it is contended by the trustee that Section 67-e is the controlling section, and that

the facts bring him squarely within the provisions of that section, and that the mortgage should be held void.

That part of Sections 60-a-b and 67-e which is material to the consideration of this case, is as follows:

> Sec. 60-a. "A person shall be deemed to have given a preference, if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required."
>
> 60-b. "If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be *voidable* by the trustee, and he may recover the property or its value from such per-

son. And, for the purpose of such recovery, any Court of Bankruptcy, as hereinbefore defined, and any State Court, which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

67-e. "*That all* conveyances, transfers, assignments, or *incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this Act subsequent to the passage of this Act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor.* * * * * and all property of the debtor conveyed, transferred, assigned or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. * * * * For the purpose of such recovery, any Court of Bankruptcy as hereinbefore defined, and any State Court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

It is conceded that Armstrong was adjudged a bankrupt within four months after May 2nd, 1904, the date of the giving of the mortgage in controversy.

If this mortgage was given with the intent and purpose on the part of the bankrupt to hinder, delay or defraud his creditors, then the mortgage is null and void as against the trustee under the plain terms of Section 67-e.

IS NOT THE INTENT AND PURPOSE TO HINDER, DELAY OR DEFRAUD CREDITORS TO BE PRESUMED FROM THE GIVING OF THE MORTGAGE OF MAY 2ND, 1904, WHEN ITS NECESSARY EFFECT WAS TO SO HINDER, DELAY OR DEFRAUD?

What do the words "intent and purpose to hinder, delay or defraud creditors" mean? Are they to be given their ordinary and every day meaning, or is a forced construction to be placed upon them? It is said by Circuit Judge Sanborn in the opinion handed down in the case at bar:

> "The contention that the intent to hinder, delay and defraud other creditors must be inferred from the fact that the inevitable effect of the mortgage was to deprive them of the opportunity to collect their claims in full, and

from the rule of law that every one is presumed to intend the natural and probable effect of his acts, is not tenable here. It is every intent to hinder, delay or defraud creditors unlawfully only, not every intent to hinder or delay them, that avails to avoid a transfer made for a pre-existing debt under Section 67-e. An insolvent debtor until the commencement of proceedings in bankruptcy still has the *jus disponendi* of his property. He has the right to secure and pay his debts with it, and he has the right to secure and pay one creditor in preference to others, provided always the security or the payment is not violative of any of the acts of congress or of any of the statutes of the state. A preference of one creditor over others by such a payment or by such security, which is free from actual and intended fraud, and from any purpose to affect other creditors injuriously, beyond the necessary effect of the security or the payment, is valid and lawful, and it cannot evidence such an intent to hinder, delay and defraud as will make it void or voidable under Section 67-e."

If it is lawful for a debtor, prior to bankruptcy procedings to secure his debts with his property, and secure one creditor in preference to others, and the word "unlawful" is to be read into the provisions of Section 67-e, then no transfer made by a

debtor to secure a pre-existing, unsecured *valid* debt is void.

It must be borne in mind that the language of the statute is "hinder, delay *or* defraud," and not "hinder, delay *and* defraud;" so if the intent be either to hinder, or to delay, or to defraud, the mortgage is void.

In the case of *Crow vs. Beardsley,* 68 Mo. 439, the Court says:

> "The statute declares that conveyances made with the intent to hinder, delay or defraud creditors shall be taken to be clearly and utterly void. The words "hinder," "delay" and "defraud" are not synonymous. A conveyance may be made with intent to hinder or delay, without an intent to defraud. Either intent is sufficient."

Surely if congress had intended that "intent to hinder, delay or defraud creditors" must be unlawful, the Act would have so provided. There can be no question but that the conveyance from Armstrong to Arts operated to hinder and delay his other creditors. Does it not also, under the provisions of the Bankrupt Act, operate to defraud them?

In *Wager vs. Hall,* 16 Wall. 584, 21 L. Ed. 504, this Court, in considering the 35th section of the

Bankrupt Act of 1867, relating to preferential transfers of property to a creditor by an insolvent, said:

> "The transfer by a debtor who is insolvent, of his property, or a considerable portion of it, to one creditor as a security for a pre-existing debt, without making any provision for an equal distribution of its proceeds to all his creditors, operates as a preference to such transferee, and must be taken as *prima facie* evidence that a preference was intended, unless the debtor or transferee can show that the debtor was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts; and that a transfer by an insolvent debtor of his property, or any considerable portion of it, with a view to secure it to one creditor, and thus prevent an equal distribution among all his creditors, *is a transfer in fraud of the Bankrupt Act.*"

So far, then, as Armstrong was concerned, the Arts mortgage was "a transfer in fraud of the Bankrupt Act." Under these circumstances the "intent to hinder, delay or defraud" will be conclusively presumed, because Armstrong was admittedly insolvent, and knew of his condition.

Section 3 of the Bankrupt Act provides:

> "Acts of bankruptcy by a person shall consist of his having * * * * or (2) trans-

ferred while insolvent any portion of his property to one or more of his creditors, with intent to prefer such creditor over his other creditors * * * *"

It was said *In re Gilbert*, 112 Fed. 953:

"To authorize an adjudication of bankruptcy, it must appear that the transfers complained of were made with intent to prefer the creditors to whom they were made. If the respondent was insolvent, and had knowledge of the fact, an intent to prefer will be conclusively presumed."

To the same effect are:

Johnson vs. Wald, 93 Fed. 640.
In re McGee, 105 Fed. 895.

There is just as much reason for contending that the transfer with intent to prefer creditors must be with an "unlawful" intent in order to constitute an act of bankruptcy, as there is to contend that a transfer made by a debtor with intent to hinder, delay or defraud creditors is not void unless it be "unlawful." The transfer in either case is made "unlawful" by the Act itself.

If, as said by Circuit Judge Sanborn in the case at bar, a preference is valid and lawful which is free from *actual* and *intended* fraud it would be impossible in many, if not most cases of alleged bankruptcy, to prove an act of bankruptcy or set

aside a conveyance which would operate to protect one creditor as against all others.

Under the Act so construed, unsecured creditors would have no relief except in cases of actual and intended fraud, and there could be no actual or intended fraud where the debtor was indebted to the preferred creditor.

That such a construction is forced and unnatural, it seems to counsel, is conclusively shown by the fact that liens obtained through legal proceedings against an insolvent at any time within four months of the filing of a petition in bankruptcy in case he is adjudged bankrupt, shall be null and void.

Mortgages given by an insolvent within four months of adjudication in bankruptcy, while valid in the absence of a nullifying statute, are expressly made voidable or void by the Bankrupt Act. The validity of the conveyance is not to be construed under the law in force prior to the passage of the Act, but is to be construed according to the language of the Act, taking into consideration the purposes of the Act.

The Court of Appeals found that the bankrupt did not make the mortgage with any intent or purpose to hinder and delay his other creditors, notwithstanding its necessary effect was to so hinder and delay and to deprive them of an opportunity they

might otherwise have had to collect larger portions of their claim. (Record, p. 27).

Is the statement of the bankrupt that it was his intention to hinder, delay or defraud his creditors, necessary to show such intent? Will no other facts conclusively indicate intent?

The question of intent was passed on in *Toof vs. Martin,* 13 Wall. 40.

This case arose under the Bankrupt Act of 1867. The assignee in bankruptcy sought to cancel certain conveyances alleged to have been made in fraud of that Act, and it was incumbent upon him to show, among other things, that the conveyances were made with a view to give a preference to the defendant creditor. In discussing this branch of the case, Mr. Justice Field said:

> "That the conveyances to Toof, Phillips & Co. were made with a view to give them a preference over other creditors, hardly admits of a doubt. The bankrupts knew at the time their insolvent condition. A month previous they had made up a balance sheet of their affairs, which showed that their assets were insufficient to pay their debts. They had contemplated going into bankruptcy in December previous, and were then pressed by numerous creditors for payment. Their indebtedness at the time exceeded $50,000.00 and except to Toof, Phillips & Co.,

they did not pay upon the whole of it over $500.00 during the previous fall and winter. Making a transfer of property to these creditors under these circumstances, was in fact giving them a preference, *and it must be presumed that the bankrupts intended this result at the time. It is a general principle, that every one must be presumed to intend the necessary consequences of his acts. The transfer in any case by a debtor of a large portion of his property while he is insolvent, to one creditor, without making provision for an equal distribution of its proceeds to all his creditors, necessarily operates as a preference to him, and must be taken as conclusive evidence that a preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. The burden of proof is upon him in such case, and not upon the assignee or contestant in bankruptcy.*"

In the case of *Wilson vs. City Bank*, 17 Wall. 473, arising under the 1867 Act, where an assignee in bankruptcy sought to recover certain goods, or the proceeds thereof from a creditor who had levied on them under a judgment obtained in an undefended action brought against the bankrupt, Mr. Justice Miller, delivering the opinion of the Court, said:

"The general legal proposition is true, that where a person does a positive act, the consequences of which he knows beforehand, that he must be held to intend those consequences; but it cannot be inferred that a man intends, in the sense of desiring, promoting or procuring it, a result of other persons' acts, when he contributes nothing to their success or completion, and is under no legal or moral obligation to hinder or prevent them.

Argument confirmatory of these views may be seen in the fact that all the other acts or modes of preference of creditors found in both the sections we have mentioned in direct context with the one under consideration, are of a positive and affirmative character, and are evidences of an active desire or wish to prefer one creditor to others. Why then should a passive indifference and inaction, where no action is required by positive law, or good morals, be construed into such a preference as the law forbids?"

The doctrine laid down in the case last quoted from, is that passive non-resistance is not sufficient to charge the bankrupt with an intent to prefer. In the case at bar, however, the bankrupt was active. It was because of his positive and affirmative act in giving the mortgage that the lien was created, and Arts placed in a favored position.

In the case of *Western Tie & Timber Co. vs. Brown,* 196 U. S. 502, 25 S. C. Rep. 339, this Court

discussed the question of imputing intent to a bankrupt creating a preference, and Mr. Justice White, writing the opinion, said:

> "This conclusion, moreover, is the result of the finding that Harrison had no intention to give the Tie Company a preference, for, if Harrison being insolvent to the knowledge of the company, within the prohibited period, gave to the Tie Company authority to collect the sums due to him by the laborers for goods sold them, with the right, or even the option to apply the money to a prior debt due by Harrison to the company, the necessary result of the transaction would have been to create a voidable preference. *And if the inevitable result of the transaction would have been to create such a preference, then the law would conclusively impute to Harrison the intention to bring about the result necessarily arising from the nature of the act which he did.*"

The bankrupt must be held to have intended the necessary effect of his act.

In re Ed W. Wright Lumber Co., 114 Fed. 1011.
In re Platts, 110 Fed. 126.
In re McLam, 97 Fed. 922.
Pollock vs. Jones, 124 Fed. 163.
In re Gutwillig, 92 Fed. 337.
In re Gutwillig, 90 Fed. 475.

Unless intent be evidenced by the positive acts of the bankrupt, and the natural and necessary effects of such acts, how can it be shown?

In the case at bar, the bankrupt was insolvent, and knew he was insolvent, when he gave the mortgage covering the greater part of his property to secure one creditor. (Record, pp. 26, 27).

What more conclusive evidence of an intent to prefer one creditor to the exclusion of others could be found? The giving of the mortgage admittedly operated to hinder, delay or defraud other creditors. The act of the bankrupt in signing his name to the mortgage, and delivering it to Arts was a positive and affirmative act, involving brain action. The intent to sign and deliver the mortgage must necessarily carry with it the intent to effect the necessary result of such signing and delivery.

It would be impossible in a majority of cases to show by the bankrupt that he had an intent to prefer a particular creditor at the time of the execution of a particular mortgage. All that a bankrupt would have to do to protect a favored creditor would be to refrain from making a statement as to his intent, if intent is never to be presumed.

Where the ordinary, probable, and indeed certain result of the act of the bankrupt in giving a mortgage to one creditor covering a large portion of

his property, is to hinder, delay or defraud other creditors, manifestly the bankrupt should be charged with the intent to produce the result his act produced.

It does not lie in the mouth of the preferred creditor to say that the bankrupt did not intend to hinder, delay or defraud other creditors.

The bankrupt was insolvent, he knew he was insolvent, and he must be held to have intended that which was the necessary consequence of his act.

CONCEDING THAT THE CLAIMANT HAD NO KNOWLEDGE OF THE BANKRUPT'S TRUE FINANCIAL CONDITION ON MAY 2ND, 1904, IS NOT THE MORTGAGE, VOID UNDER THE PROVISIONS OF SECTION 67-E OF THE BANKRUPT ACT?

Section 60-a defines a preference to be a transfer of property while insolvent, the effect of the enforcement of which will enable one creditor to obtain a greater percentage of his debt than others of the same class.

Section 60-b provides that a transfer shall be *voidable* by the trustee if

(a) the bankrupt has given a preference,
(b) and the creditor receiving it had reason-

able cause to believe it was intended thereby to give a preference.

Section 67-e provides that a transfer shall be *void* if

(a) made or given by a person adjudged a bankrupt, within four months prior to the filing of the petition.

(b) with intent and purpose on his part to hinder, delay or defraud his creditors.

The word "transfer" as defined in Section 1 of the Act includes a mortgage conveyance. Such mortgage conveyance when a preference, and received by a creditor having reasonable cause to believe a preference was intended, is voidable at the instance of the trustee, and he may recover the property or its value, under Section 60-b. Where the creditor did not have reasonable cause to believe a preference was intended, the transfer cannot be avoided under Section 60-b, but if the bankrupt made a transfer within four months of adjudication as a bankrupt, and with the intent to hinder, delay, or defraud his creditors, then such transfer is not merely voidable, but is absolutely void under Section 67-e.

Under Section 60-b the knowledge or want of knowledge of the mortgagee is the controlling

feature; while under Section 67-e the knowledge or want of knowledge of the mortgagee is immaterial.

The provisions of Sections 60-b and 67-e if united in one section would not be inconsistent. They do not apply to the same condition of affairs. One protects unsecured creditors against a favored creditor with knowledge, while the other protects unsecured creditors against the acts of a bankrupt debtor.

If the mortgage involved in this case could only be attacked by the trustee under the provisions of 60-b, it could not be voided, because the Court of Appeals has found that the claimant did not have reasonable cause to believe that it was intended to give him a preference; but the mortgage is absolutely void under Section 67-e, because given within four months time of adjudication in bankruptcy, by a bankrupt, with intent to hinder, delay or defraud his creditors.

This Court said in *Wilson Bros. vs. Nelson,* 183 U. S. 191, 22 S. C. Rep. 74:

> "The provisions of the 1898 Act differ in important respects from those of the earlier Acts. The Act of 1898 makes the result obtained by the creditor, and not the specific intent of the debtor, the essential fact."

It is impossible to read the Act as a whole without becoming convinced that its dominant purposes are (1) the protection and discharge of the bankrupt, and (2) the distribution of the unexempt property which the bankrupt owned four months before the filing of the petition, share and share alike among his creditors. This is apparent from the history of the Act.

The Bankrupt Act of 1898 was known as Senate Bill No. 1035.

The following is a copy of Section 67 as it stood at the time the bill first passed the Senate:

> "Sec. 67. Liens—*a*. Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt, shall not be liens against his estate.
>
> *b*. Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate.
>
> *c*. A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months be-

fore the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this Act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened.

d. Liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this Act."

After passing the senate the bill went to the house, and passed the house with certain amendments, but these amendments did not affect Section

67. The bill then went back to the senate for concurrence. The senate refused to concur, and a conference committee was appointed. This committee, after some days agreed on a bill and made its report to the senate and the house. The report to the house contained the following language:

> "XIX. By an addition to Section 67, which relates to liens, the bill has been materially strengthened. All levies, judgments, attachments, and other liens, obtained through legal proceedings, against a person who is insolvent, within the four months before a petition is filed, are declared null and void, in case he is adjudged a bankrupt. *Bona fide* purchasers, for value, on a sale under such a lien, etc., are fully protected.
>
> In effect, liens of any description, obtained upon the property of a bankrupt, within four months of the adjudication are made null and void, except when given for a new and fair consideration, to a person who has no notice of the insolvency, or no reasonable cause for inquiry."
>
> (Congressional Record (House), page 6428, 55th Cong. 1898.)

Mr. Henderson made the report of the conference committee to the house, and in the course of his remarks, said that substantial amendments had

been made to certain sections of the Bankrupt Act, and specifically mentioned Section 67 in that connection.

(Congressional Record (House), page 6429, 55th Cong. 1898.)

The bill as reported by the conference committee, passed congress and is known as the Bankrupt Act of 1898. The additon to Section 67 referred to in the conference report, is what is known as paragraphs e and f, which read as follows, prior to the amendment of February 5th, 1903:

> "e—That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this Act subsequent to the passage of this Act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee,

whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise, for the benefit of the creditors. And all conveyances, transfers or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void, as against the creditors of such debtor by the laws of the state, territory or district in which such property is situated, shall be deemed null and void under this Act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt.

f—That all levies, judgments, attachments or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the Court shall, on due notice, order that the right under such levy, judgment, attachment or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the Court may

order such conveyance as shall be necessary to carry the purposes of this section into effect; *Provided,* That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a *bona fide* purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

It is thus apparent from the language of the conference committe, and the remarks of Ex-Speaker Henderson that congress intended that all liens of any description, obtained upon the property of a bankrupt, within four months of adjudication in bankruptcy, should be null and void, except liens protected under the provisions of Section 67-d.

Section 67 is entitled "Liens." It refers particularly to liens. That force must be given to Section 67-e is shown by the language of Section 57-g:

> "The claims of creditors who have received preferences, voidable under Section 60, subdivision b, or to whom conveyances, transfers, assignments or incumbrances, void or voidable under Section 67, subdivision e, have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments or incumbrances."

The bill as first passed by the senate and house, did not contain Section 67-e, and did not specifically

provide that all liens given within four months should be null and void. It, however, expressly protected liens given for a present consideration, and therefore impliedly denounced those given for a pre-existing consideration. That there might be no question, however, that all liens given within four months of bankruptcy should be held null and void, unless given for present consideration, etc., paragraph "e" was added.

Subdivisions "c" and "f" of Section 67 were carefully considered in *In re Richards* (C. C. A.), 96 Fed. 935, and it was held that the two subdivisions "c" and "f" of Section 67 of the Bankrupt Act, relating to the effect of an adjudication of bankruptcy upon existing liens upon the property of the bankrupt, acquired through legal proceedings, are antagonistic, and irreconcilable, and therefore in any case of conflict between them, the former must give way, and the latter prevail. The reason being that subdivision "f" was incorporated into the bill after subdivision "c."

If it could be contended that Sections 60-b and 67-e were antagonistic, Section 67-e would have to prevail under the rule laid down in *In re Richards, supra.*

Can it be possible that congress intended that any judicial lien obtained by a diligent creditor

within four months of bankruptcy should be held void, regardless of knowledge, and that a lien given voluntarily by a bankrupt to a favored creditor should be sustained?

Section 67-e can no more be disregarded than Section 67-f. They were added at the same time to emphasize the idea of equal distribution of the unexempt property of a bankrupt.

If a mortgage given by a bankrupt to secure a pre-existing, unsecured indebtedness is valid, why Section 67-d? "Liens given or accepted in good faith, and not in contemplation of or in fraud upon this Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this Act."

Certainly if a mortgage to secure a pre-existing, unsecured indebtedness is valid, there could be no question about a mortgage for a present consideration, and the sub-division last quoted would be unnecessary. But, if as contended by counsel for the trustee, a mortgage of the kind involved in this case is void, then a reason for the provisions of Section 67-d is disclosed.

The case of *Pirie vs. Trust Co.,* 182 U. S. 438, 21 S. C. Rep. 906, is not unfamiliar to counsel, but the reasoning which applies in the case of an attempt to

recover payments of money, made in the usual course of business without intent to prefer, does not apply in this case.

In the case at bar, claimant has filed his claim, and seeks to retain his lien, or be paid out of the proceeds of the sale of the mortgaged property. In other words, he asks the Bankruptcy Court to give him affirmative relief and prefer him to all other creditors.

In the case of *Thompson, Trustee, vs. Fairbanks*, 196 U. S. 516, 25 Sup. Ct. Rep. 306, the question involved was as to the validity of a chattel mortgage executed and recorded in 1891. Possession of the property covered by the mortgage was not taken, however, until May 16th, 1900, which was within four months of the time when the mortgagor was adjudged a bankrupt. Mr. Justice Peckham delivered the opinion of the Court, and held the mortgage valid, and the mortgagee entitled to the possession of the property covered by the mortgage, though taken within four months of adjudication in bankruptcy, because, under the Vermont law, the taking of possession related back to the date of the mortgage. In the course of the opinion, Mr. Justice Peckham said:

> "There is a distinction between the bald creation of a lien within the four months, and

the enforcement of one provided for in a mortgage executed years before the passage of the Act, by virtue of which mortgage, and because of the condition broken, the title to the property becomes vested in the mortgagee, and the subsequent taking possession becomes valid except as above stated. A trustee in bankruptcy does not in such circumstances, occupy the same position as a creditor levying under an execution or by attachment, and his rights in this exceptional case, and for the reasons just indicated, are somewhat different from what they are generally stated."

In the case of *Keppel, Trustee, vs. Tiffin Savings Bank*, 197 U. S. 356, 25 Sup. Ct. Rep. 443, the bank held two real estate mortgages given by the bankrupt, one to secure a note for $4,000, executed more than four months before adjudication in bankruptcy, and the other to secure a note for $2,000.00 executed within four months of the adjudication in bankruptcy. Suit was brought by the trustee to cancel both mortgages. The lower Court held the $2,000.00 mortgage to be void, and on appeal to the Circuit Court, the bank waived any claim to a preference on account of that mortgage. A judgment was therefore entered in the Circuit Court, sustaining the $4,000.00 mortgage, and voiding the $2,000.00 mortgage. The bank thereupon sought to prove up as a

general creditor of the estate on the $2,000.00 note. The referee refused to allow the proof, upon the ground that the bank had compelled the trustee to sue to cancel the $2,000.00 mortgage, and therefore had lost its right to prove the claim against the estate. The District Judge, upon review, reversed the ruling of the referee, and the Circuit Court of Appeals, to which the issue was taken, certified the questions involved to the Supreme Court. Mr. Justice White, speaking for a majority of the court, said:

> "Before we develop the legal principles essential to the solution of the first question, it is to be observed that the facts stated in the certificate, and implied by the question, show that the bank acted in good faith when it accepted the mortgage, and when it subsequently insisted that the trustee should prove the existence of the facts which it was charged vitiated the security. It results that the voidable nature of the transaction alone arose from Section 67-e of the Act of 1898 invalidating 'conveyances, transfers or encumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the state, territory or district in which such property is situate' (30 Stat. at L.

565, Chap. 541, U. S. Comp. Stat. 1901, p. 3449), and giving the assignee a right to reclaim and recover the property for the creditors of the bankrupt estate. * * * * Undoubtedly the preference clauses of the present Act differing in that respect from the Act of 1867, as is well illustrated by the facts of this case, include preferences where the creditor receiving the same acted without knowledge of any wrongful intent on the part of the debtor, and in the utmost good faith."

The majority of the court held that the bank had not lost its right to prove its $2,000.00 claim secured by the mortgage, which had been held void. A dissenting opinion, however, was filed, and speaking for the minority of the Court, Mr. Justice Day said:

"In view of the purpose of the Bankruptcy Act to make an equal distribution of the bankrupt's estate among creditors of the same class, and to avoid preferences made within four months, I think, having in view the first question put by the Circuit Court of Appeals, that the sections of the law in question must be construed to put a creditor who has received a merely voidable preference, which could be recovered from him by the trustee, to his election between striving to retain that which he has received, and voluntarily surrendering his preference, and filing his claim that he may participate with other unsecured creditors in the gen-

> eral distribution of the estate. * * * * The importance of the ruling just made is shown in its application, not only to the Act of 1898 as it originally stood, but to the Act as it now stands since the amendment of February 5, 1903, which only requires a surrender of preferences when the same are in violation of subdivision 'b' of Section 60, or void or voidable under Section 67, subdivision 'e.'"

While apparently the $2,000.00 mortgage was held void under the provisions of the Ohio statute, it was at the same time equally void under that part of Section 67-e declaring void any incumbrances made with the intent and purpose to hinder, delay or defraud creditors.

As is said by Mr. Justice White, "The facts stated in the certificate and implied by the question, show that the bank acted in good faith when it accepted the mortgage.

Both the majority and minority opinion indicate that the purpose of the 1898 Act is the equal distribution of the bankrupt's estate and the avoidance of preferences made within four months.

In the case of *Morgan, et al., vs. First National Bank of Mannington, et al.,* 145 Fed. 466, decided by the Circuit Court of Appeals, Fourth Circuit, the question involved was as to the validity of a trust deed, given to secure an antecedent debt by a bank-

rupt within four months of the institution of bankruptcy proceedings. In the opinion in that case, the Court said:

> "There appears to be nothing in this record to indicate that any actual fraud was contemplated, or had, in the making of the trust deed in question, and the acceptance of the securities thereunder, but that the same was intended to create a preference, and the securities accepted for that purpose, and at a time when the grantor in the deed was insolvent, and resulted in giving such preference, is manifest, and it is equally clear that the trust deed, having been made within four months of the filing of the bankruptcy petition, is avoided by the adjudication of the grantor therein as a bankrupt. Nothing is better settled, under the present Bankruptcy Act, than that all conveyances, transfers or incumbrances, other than for value, or a present consideration given by a bankrupt within four months of the filing of the petition in bankruptcy against him, either for the purpose of hindering, delaying of defrauding creditors, or giving one a preference over another, or the effect of which is to enable any one creditor to obtain a greater percentage of his debt than any other of such creditors of the same class, become inoperative and null and void upon the adjudication in bankruptcy."

In the case of *Pollock vs. Jones,* 124 Fed. 163, where the question was as to the validity of a chattel mortgage given to secure a pre-existing debt, the Court said:

> "It is no unfair inference to draw that both of them supposed that the circumstances surrounding them required the largest concession in the way of security. Beside this, Mr. Pollock must have known, and the record seems to show that he did know, that Jones & Duff had other creditors. Yet, by taking this mortgage, covering and controlling their entire stock of goods of every description in their possession, present and future, he practically made the firm at that instant insolvent to the extent, at least, of appropriating all the assets of the firm to the payment of one favored creditor, and if these be required to pay him in full, leaving nothing for other creditors. Be this as it may, is this mortgage given by an insolvent to one not knowing the insolvency, void under the bankrupt law? It goes without saying that it was a preference, and that it was intended as a preference. Under Section 60-a, a person shall be deemed to have given a preference, if, being insolvent he has made a transfer of any of his property, and if the effect of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. 'Transfer includes the sale and every other and different

mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security.' Act 1898, c. i. subd. 25 (Act July 1, 1898 c. 541, 30 Stat. 544, Sec. 1 U. S. Comp. 1901, p. 3430). A chattel mortgage transfers property and affords the most efficient mode of obtaining and reducing it into possession. Section 67-e provides 'that all conveyances, transfers, assignments or incumbrances of his property or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this Act subsequent to the passage of this Act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor.'

In this case, without the knowledge or authority of his partner, carefully concealing the fact from his partner and never, although having full opportunity afterwards, disclosing it, Duff executed a mortgage of all the property of the firm, and of its future stock, to Pollock for this debt. He could devise no better mode of hindering, delaying and defrauding his creditors, nor could he better disclose intent to prefer Pollock to their disadvantage. Counsel for appellant lay great stress upon the finding of the Court below that there is no good reason to believe that Mr. Pollock was aware of the insolvency of the firm when he took the mortgage.

He argues that Pollock thus comes within the provisions of Section 60-b, in which it would appear that the party obtaining a preference must have reasonable cause to believe that it was thereby intended. For this position he relies upon *Pirie vs. Chicago, etc., Co.*, 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171. This case simply decides that when a creditor, in the course of business, receives payments on accounts from his debtor, not knowing that they were intended as a preference, he cannot prove for the remainder of his claim without surrendering the payments he has received. If he does not prove his claim, he may retain that which he has received innocently. Preferences are abhorrent to the bankrupt law, and contrary to its entire spirit and purposes. Yet, if a creditor, in the course of business, receives payments in money, not knowing that they, in fact, constituted a preference, he may retain them, provided that he seek nothing further from the bankrupt's estate. In other words, he retains his preference at the cost of the rest of his claim. If he seeks further aid from the bankrupt's estate, he must surrender his preference.

It would seem that there is a great difference in the attitude of a creditor who has actually received in possession, without knowledge of a preference, money or property of his debtor who is afterwards adjudicated a bankrupt, and that of a creditor who has received such a preference which only can be secured to

him upon application to the court of bankruptcy, and who applies to that Court to put him in possession. In the first case he may retain what he has received, losing all claim for any balance of his debt; in the latter case he can get no relief without surrendering his preference. In the Pirie case it was found as a matter of fact that when the payments were made Pirie did not have reasonable cause to believe that the bankrupt, by said payments, intended thereby to give a preference. Nor did the bankrupt by such payments intend thereby to give a preference. In the case at bar, when Pollock received this chattel mortgage covering all the property of the mortgagee, and when Duff gave the mortgage practically clothing Pollock with a legal title to all the property of the firm, it is impossible to say that the one did not know that he got a preference, and that the other was unaware that he gave a preference. The appellant also relies upon the case of *McIntyre vs. McNair*, (C. C. A.) 113 Fed. 113, as applicable to this case. The facts found in that case were that when the mortgage of Sanderlin, who afterwards became a bankrupt, was executed, it was intended in good faith, neither Sanderlin nor his mortgagee having any knowledge that he was insolvent, nor is there anything in the record showing that Sanderlin was then insolvent. Section 67d. Concluding the discussion of this branch of the case, the language of the Circuit Court of Appeals by Sanborn, Circuit Judge, in

Swarts vs. Fourth Nat. Bank, 117 Fed. 1, 54 C. C. A. 389, is not without force."

In the case of *In re Gutwillig*, 92 Fed. 337, decided by the Circuit Court of Appeals, Second Circuit, Circuit Judge Wallace, speaking for the court said:

"It is impossible to believe that Congress while precluding a creditor from obtaining preferences over other creditors by legal proceedings, however regularly and fairly employed, should have intended to permit the debtor to select one or more favored creditors, and give him or them preference by his voluntary act. * * * These provisions manifest unmistakably the intention of Congress not only not to permit preferences to be acquired upon the bankruptcy of a debtor when he is about to become a bankrupt, but also to annul all dispositions of his property, except to innocent purchasers, which will defeat the rights of creditors to a distribution by the instrumentalities and according to the scheme of the bankrupt act. The purchaser of a title under a lien acquired by legal process, is not protected unless he took it without notice of its preferential origin. The purchaser under a voluntary conveyance must not only be a purchaser in good faith, but he must be one who has subtracted nothing essentially from the value of the debtor's assets. They are wholly inconsistent with an interpretation of the clause

annulling voluntary conveyances which will permit such conveyances to stand when intended to defeat the operation of the bankrupt act. This clause must be interpreted in a sense which harmonizes with the general intent of the section as gathered from the other clauses, and thus read, it annuls any conveyance made to impair or defeat the remedy of creditors under the bankrupt act unless made to a purchaser not in complicity with the insolvent, and for a 'present fair consideration.' "

The validity of a mortgage given within four months preceding bankruptcy, to secure a pre-existing, unsecured indebtedness, has been passed on and denied in many cases:

City National Bank vs. Bruce (C. C. A.), 109 Fed. 69.
In re Sanderlin, 109 Fed. 857.
In re Jones, 118 Fed. 673.
In re Sawyer, 130 Fed. 384.
In re Cobb, 96 Fed. 821.
In re Belding, 116 Fed. 1016.
In re Wolf, 98 Fed. 84.
In re Gutwillig, 90 Fed. 475.
In re Durham, 114 Fed. 750.
Davis vs. Turner, 120 Fed. 605.
In re Pease, 129 Fed. 447.

If the Arts mortgage is to be sustained, the practical effect is to permit the preference of one

creditor to the exclusion of others. That this is abhorrent to the spirit of the Bankrupt Act is apparent. Is it not equally abhorrent to the letter of the Act?

IS NOT THE AMOUNT ALLOWED CLAIMANT BY THE CIRCUIT COURT OF APPEALS EXCESSIVE?

The Court of Appeals has computed and allowed interest to March 1st, 1906, on the amount found due Arts, instead of to July 27th, 1904. (Record, p. 27).

The claim of Arts being provable only as an unsecured claim, interest should have been allowed on the amount found due only to July 27th, 1904, the date when the petition was filed.

Section 63 of the 1898 Bankruptcy Act; U. S. Comp Stat. 1901, p. 3447.

Respectfully submitted,

MYRON L. LEARNED,

Attorney for Appellant.

Supreme Court of the United States

October Term, 1907.

No. 324.

JOSIAH CODER, TRUSTEE OF THE ESTATE OF ALEXANDER ARMSTRONG, BANKRUPT,

Appellant.

vs.

WILLIAM ARTS,

Appellee.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR APPELLANT ON THE QUESTION OF JURISDICTION.

The question of jurisdiction was not touched on in the brief heretofore filed on behalf of appellant, because it was thought no doubt existed as to the right of appeal under the rule laid down in the case of *Hewit vs. Berlin Machine Works*, hereinafter referred to.

No motion to dismiss the appeal was filed, and it was not until shortly before the argument, when

it was too late to prepare a brief on that point, that counsel for trustee was aware that the question had been raised.

In compliance now with the order of the Court, of February 23rd, 1909, counsel is only too glad to file a printed brief on the point indicated.

The appellee filed with the referee on August 26th, 1904, a paper called a claim in which he alleged that the bankrupt was indebted to him in the sum of One Hundred Four Thousand, Eight Hundred Eighty and 46-100 Dollars, ($104,880.46), and that a mortgage covering certain realty in Carroll County, Iowa, had been given as security. (Record pp. 1, 2, 3.)

The trustee filed objections in which he denied that the bankrupt was indebted to Arts in the amount alleged to be owing, and especially denied the validity of the mortgage. (Record pp. 6, 7.)

Evidence to the extent of several hundred pages was then taken before the referee, practically all of which was directed to the validity or invalidity of the mortgage involved. The referee made findings of fact only, having been ordered not to make or adopt any conclusions of law. (Record pp. 8, 9, 10, 11.)

The case then went to the District Court on petitions for review filed by both appellee and trustee.

After the submission of the case, the Honorable District Judge, on April 7th, 1906, entered what was termed a "final decree" which contained the following language:

> "Fifth. That there is now due and owing on said notes with interest computed at the rate of eight per centum per annum to the 26th day of August, 1904, the sum of $97,497.40, principal and interest. And said claim to the amount set forth in this paragraph are hereby established. To which finding and conclusion and each thereof the Trustee excepts." (Record p. 18.)
>
> "Thirteenth. That the said mortgage of May 2, 1904, under and according to the laws of the State of Iowa, was a good, valid, and enforceable one on the property therein described, and not voidable by the Trustee in bankruptcy herein, or void for any reason, and the same should be and is hereby sustained in all respects. To which findings and each of them the Trustee excepts." (Record p. 19.)
>
> "It is therefore hereby ordered, adjudged and decreed that the said claim of William Arts, on account of the four notes referred to in the Fourth Finding of Facts herein, and secured by the said mortgage of May 2, 1904, be and the same are established against the Trustee and estate of Alexander Armstrong, bankrupt, and the said notes and the mortgage securing the same, are hereby declared to have been a good, valid and enforceable lien on the property described in

said mortgage from the time of the giving and recording of said mortgage down to the time when said property was sold by the Trustee in Bankruptcy herein, under order of this Court, discharged and free and clear of all liens, and are now a good, valid and enforceable lien on the proceeds of the sale of said land in the hands of the Trustee. To which said order, adjudication and decree, and each part thereof, the Trustee excepts.

It is further ordered, adjudged and decreed that the said claims of the said William Arts on account of said four notes aggregating principal and interest the sum of $97,497.40 as found in the Fifth Finding of Fact, herein be paid in full to the said William Arts, Claimant, by the Trustee out of the funds and moneys in his hands by him received on account of the sale of the lands covered by said mortgage and hereinbefore described, after the payments of all prior liens and claims thereon as determined by this Court. To which said order, adjudication and decree, and each part thereof, the Trustee excepts." (Record p. 20.)

There were other findings of fact bearing on the validity of the mortgage which it is unnecessary to set out for the purpose of the argument as to the right of appeal.

WAS THIS DECREE SUBJECT TO REVIEW ON APPEAL BY THE CIRCUIT COURT OF APPEALS?

The first question to be determined is as to the character and nature of the controversy. Was it a controversy arising in bankruptcy proceedings, or simply a part of the proceedings in bankruptcy?

The pleadings consisted of the claim of the appelee, and the amended objections of the trustee. The so-called claim filed by the appellee set forth his mortgage, the notes it secured, and the specific land upon which he claimed a lien under it. The issue it presented was whether or not the mortgage was valid. It was in effect a petition, as it started the machinery of the bankrupt court, while the amended objections constituted the answer of the trustee.

If there be any doubt as to what the issues really were, the decree of the District Court conclusively demonstrates that the validity of the mortgage of May 2nd was the one important issue in the case. While the amount due on the mortgage debt was involved, it was but merely as an incident.

It should be borne in mind that the appellee did not ask for the allowance of his claim against the estate of the bankrupt, but asked that his mortgage

be sustained and he be paid out of the proceeds of sale.

No claim could be allowed until the validity of the mortgage was established, because the claim is predicated on the mortgage. The basis of the claim of Arts is that he is the owner (as mortgagee) of part of the property in the trustee's hands. To show the extent of his ownership, he must prove the amount due him, but clearly that is a secondary matter.

It was expressly stated in the so-called claim that:

> "Deponent in filing his claim herein against the bankrupt does so with the express understanding that he makes no waiver of any portion of his security and expressly reserves said security and every portion thereof to the amount of said claim, including the cost if any, of collecting payment thereof out of said property held as security." (Record p. 3.)

The provisions of Section 57-g of the Act absolutely precluded the allowance of the claim as a claim against the estate, because of the failure to surrender the security:

> Section 57-g. "The claims of creditors who have received preferences, voidable under section sixty, subdivision b, or to whom convey-

ances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision e, have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances."

The appellee, of his own volition, instituted proceedings before the referee to foreclose his mortgage. The issue tendered by the appellee was accepted by the trustee. What else could he do? Without doubt the Bankruptcy Court had jurisdiction, as the title to the land had vested in the trustee and he was in possession.

Can there be any question, however, but that the Circuit Court would also have had jurisdiction to determine the validity of the mortgage had appellee seen fit to bring his action there instead of in the Bankruptcy Court?

Section 23-a of the Bankruptcy Act provides:

"The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted

and such controversies had been between the bankrupts and such adverse claimants."

This section was construed in the case of *In re Friend*, (C. C. A.) 134 Fed. 778, by Mr. Circuit Judge Baker, who says:

> "That section 23 (30 Stat. 552 [U. S. Comp. St. 1901, p. 3431]) establishes a clear distinction between 'proceedings in bankruptcy' and 'controversies at law and in equity arising in the course of bankruptcy proceedings;' the former, broadly speaking, covering questions between the alleged bankrupt and his creditors, as such, commencing with the petition for adjudication, ending with the discharge, and including matters of administration generally, such as appointments of receivers and trustees, sales, exemptions, allowances, and the like, to be disposed of summarily, all of which naturally occur in the settlement of the estate; and the latter, broadly speaking, involving questions between the trustee, representing the bankrupt and his creditors, on the one side, and adverse claimants, on the other, concerning property in the possession of the trustee or of the claimants, to be litigated in appropriate plenary suits, and not affecting directly the administrative orders and judgments, but only the question of the extent of the estate.
>
> That the same distinction is maintained in section 24a (30 Stat. 553 [U. S. Comp. St. 1901,

p. 3431]), on the one hand, and sections 24b and 25a (30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]), on the other."

If the Circuit Court would have had jurisdiction of this controversy then clearly it was a controversy in equity as distinguished from proceedings in bankruptcy.

The Honorable District Judge entered the same kind of a decree which he would have entered had he been sitting as a Circuit Judge and the case had been pending before him in that Court. He found the amount due, and that the mortgage was valid and should be sustained, and ordered the amount so found due paid, out of the proceeds of sale of the land covered by the mortgage, then in the hands of the trustee.

The issue was certainly separate and distinct from the general subject matter of the proceedings in bankruptcy, and presented a controversy reviewable on appeal in the Circuit Court of Appeals if it had arisen in a case in the Circuit Court of the United States.

Is it not clear, therefore, that the controversy was one of those "controversies arising in bankruptcy proceedings" rather than in "proceedings in bankruptcy?"

The provisions of the Bankruptcy Act which relate to the jurisdiction of Appellate Courts are:

"Section 24. Jurisdiction of appellate courts. *a.* The Supreme Court of the United States, the circuit court of appeals of the United States, and the supreme courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of *controversies arising in bankruptcy proceedings* from the courts of bankruptcy from which they have appellate jurisdiction in other cases."

"*b.* The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved."

"Section 25. Appeals and writs of error; When taken. *a.* That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the Territories, in the following cases, to-wit, (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment

allowing or rejecting a debt or claim of five hundred dollars or over."

If this controversy was a "controversy arising in bankruptcy proceedings" it clearly was appealable under Section 24-a. This Court had occasion to pass on what constituted a "controversy arising in bankruptcy proceedings" as distinguished from mere "proceedings in bankruptcy" in the case of *Hewit vs. Berlin Machine Works*, 194 U. S. 296.

In that case it appeared that the Berlin Machine Works had sold and delivered to the bankrupt certain machines under a contract that the title should remain in the Works until the vendee had paid the purchase price. The trustee had taken possession of the machines. Thereupon the vendor filed a petition for the possession of the property, or for the payment of the debt of the bankrupt out of the proceeds of sale. The referee decided that the machines were the property of the bankrupt, and that the vendor must come in as an unsecured creditor. The District Court reversed the referee and held that the machines should be delivered to the vendor, or that the trustee should pay their value. An appeal was taken to the Circuit Court of Appeals, and that Court affirmed the judgment of the Court below, and thereupon an appeal was allowed to this

Court. Mr. Chief Justice Fuller, writing the opinion in that case, said:

> "If the trustee had carried the case to the circuit court of appeals on petition for supervision and revision under Sec. 24b of the bankruptcy law [30 Stat. at L. 553, chap. 541, U. S. Comp. Stat. 1901, p. 3432], the case would have fallen within *Holden vs. Stratton*, 191 U. S. 115, *ante* p. 45, 24 Sup. Ct. Rep. 45, and the appeal to this court would have failed. But he took it there by appeal, though accompanied by some apparent effort to avail himself also of the other method. And as the Berlin Machine Works asserted title to the property in the possession of the trustee by an intervention raising a distinct and separable issue, the controversy may be treated as one of those 'controversies arising in bankruptcy proceedings' over which the circuit court of appeals could, under Sec. 24a, exercise appellate jurisdiction as in other cases. Section 25a relates to appeals from judgments in certain enumerated steps in bankruptcy proceedings, in respect of which special provision therefor was required. (*Holden vs. Stratton*, 191 U. S. 115, *ante*, p. 45, 24 Sup. Ct. Rep. 45), while Sec. 24a relates to controversies arising in bankruptcy proceedings in the exercise by the bankruptcy courts of the jurisdiction vested in them at law and in equity by Sec. 2, to settle the estates of bankrupts, and to determine controversies in relation thereto. *Hutchinson vs. Otis*,

190 U. S. 552, 47 L. ed. 1179, 23 Sup. Ct. Rep. 778; *Burleigh vs. Foreman*, 125 Fed. 217.

The appeal to this court then followed, under Sec. 6 of the act of March 3, 1891 [26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, pp. 549, 550]."

In the case at bar, the appellee asserted a lien upon property in the possession of the trustee by an intervention raising a distinct and separable issue. Can there be any distinction between the assertion of title *to* property or the assertion of a lien *upon* property?

The case at bar was carried to the Circuit Court of Appeals on appeal, though out of excess of caution a petition for revision was also filed. The petition for revision was however dismissed, and the case decided on the appeal.

The trustee separately and specifically excepted to each finding and conclusion in the decree entered in the District Court, and among the errors set up in the assignments of error upon which he appealed to the Circuit Court of Appeals, are the following:

"Fifth. That the Court erred in finding that neither the bankrupt nor the trustee had any defense to the claim of William Arts."

"Tenth. That the Court erred in finding that the mortgage of May 2nd, 1904, was a good, valid

and enforceable mortgage on the property covered thereby, and not voidable by the trustee in bankrupty, or void for any reason."

"Eleventh. That the Court erred in finding that the mortgage of May 2nd, 1904, should be and is sustained in all respects."

"Fourteenth. That the Court erred in decreeing that the claim of the said Arts on account of said four notes covered by the mortgage of May 2nd, 1904, should be paid in full out of the funds in the hands of the trustee derived from the sale of the land covered by said mortgage."

The vital point involved was as to the validity of the mortgage and the assignments of error are directed to that phase of the case, and to the finding that the trustee had no defense to the claim of the appellee.

If a controversy between a trustee and a third party over liens alleged to exist against the property of the bankrupt, is to be regarded as part of the proceedings in bankruptcy, and no appeal will lie, then the defeated party is precluded from having the facts passed on except by the referee and the District Judge. The injustice which such a rule would work is shown in this case.

The referee found that the bankrupt was insolvent and knew he was insolvent, at the time of the giving of the mortgage in controversy. (Record p.

11.) While the Honorable District Judge set aside all the findings of the referee (Record p. 16) and found that the bankrupt while in fact insolvent at that time did not know that he was insolvent. (Record pp. 18-19.)

The Circuit Court of Appeals sustained the finding of the referee, and found that: "Armstrong was insolvent on May 2, 1904, when he gave the mortgage to Arts, and he then knew that he was insolvent." (Record p. 27.)

If this case could be reviewed only on matters of law by the Circuit Court of Appeals, then the finding of the District Court would have been final, though in the opinion of the appellate court erroneous. Such a conclusion cannot be sustained without doing violence to the rights of litigants.

Suppose in this case there had been absolutely no dispute as to the amount due from the bankrupt to appellee, would not the litigants be entitled to have the judgment of the District Court reviewed in the Circuit Court of Appeals on the facts, just as though the case went up from the Circuit Court instead of the District Court?

There was no dispute as to the amount due Berlin Machine Works in the Hewit case, *supra*. The only question was as to the ownership of specific property.

The right of appeal from the District Court to the Circuit Court of Appeals was elaborately discussed in *Dodge vs. Norlin,* (C. C. A.) 133 Fed. 363, in which case the facts were as follows:

> "The Modern Machine Works Company, a corporation, was adjudged a bankrupt on December 21, 1903. It was a manufacturing corporation, and on April 24, 1903, it had given a chattel mortgage upon its machinery, material, and merchandise to the appellant, David C. Dodge, to secure the payment to him of a debt of $4,000.00, which it had incurred for the purchase of a part of this property. Three thousand five hundred dollars of this debt remained unpaid when the adjudication in bankruptcy was made. The trustee took possession of the mortgaged property, and the mortgagee filed a claim wherein he set forth his mortgage, the specific property covered by it, and the amount of the debt secured by it. The referee adjudged that the chattel mortgage was void, and that it contituted no security for Dodge, because it described a stock of goods, wares and merchandise, and permitted the mortgagor to remain in possession and to use and enjoy them until the maturity of the debt without applying the proceeds of the sales of them to its payment. Upon a petition for a review of this decision the District Court rendered a judgment of affirmance, and within 10 days after its rendition the mortgagor appealed from that judgment to this court."

Mr. Circuit Judge Sanborn writing the opinion in that case, said:

> Under the judiciary act of March 3, 1891, the Circuit Courts of Appeals had 'jurisdiction to review by appeal or by writ of error final decision in the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law.' 1 U. S. Comp. St. 1901, p. 549, section 6, c. 517, 26 Stat. 828.
>
> The case here under consideration was not provided for in the preceding section of the act or in any other way than in section 6. The decision of the District Court that the lien by mortgage claimed by the appellant could not be enforced against the trustee who had seized the property which constituted the security for his debt was a final decision. It rendered the question of the mortgagee's right to his security res adjudicata. It finally determined a separate collateral controversy distinct from the general subject of litigation in the proceeding in bankruptcy. *Withenbury vs. U. S.*, 5 Wall. 819, 18 L. Ed. 613; *Williams vs. Morgan*, 111 U. S. 684, 4 Sup. Ct. 638, 28 L. Ed. 559; *Standley vs. Roberts*, 8 C. C. A. 305, 308, 59 Fed. 836, 839; *Salmon vs. Mills*, 68 Fed. 180, 15 C. C. A. 356; *Central Trust Co. vs. Marietta, etc., Ry. Co.*, 48 Fed. 850, 1 C. C. A. 116; *Grant vs. Railroad Co.*, 50 Fed. 795, 1 C. C. A. 681. If this controversy had arisen in a federal court when it was not sitting in bankruptcy,

the final decision of it would have been reviewable in this court by writ of error or appeal. Section 25a vests the Courts of Appeals with appellate jurisdiction of controversies arising in bankruptcy proceedings of which they have jurisdiction in other cases. As this court has appellate jurisdiction of this controversy in other cases in which it might be presented in a federal court, it has such jurisdiction when it arises in proceedings in bankruptcy.

The jurisdiction of the court of bankruptcy to render its judgment in this case was derived from section 2 (7) of the bankruptcy act of 1898, which empowers that court to 'cause the estates of bankrupts to be collected, reduced to money and distributed and determine controversies in relation thereto.' It was these controversies, among others, over which section 24a vested appellate jurisdiction in the Circuit Courts of Appeals. *Hewit vs. Berlin Machine Works,* 194 U. S. 296, 24 Sup. Ct. 690, 691, 48 L. Ed. 986; *Steele vs. Buel,* 104 Fed. 968, 969, 44 C. C. A. 287, 288; *Cunningham vs. German Ins. Bank,* 103 Fed. 933, 935, 43 C. C. A. 377, 380; *In re Columbia Real Estate Co.,* 112 Fed. 643, 645, 50 C. C. A. 406, 408.

Counsel for the appellee have persuasively argued in opposition to this conclusion that this appeal ought not to be maintained (1) because the allowance of appeals by section 25a from the decisions of courts of bankruptcy within ten days after their rendition in the three classes of

cases there specified, excludes appellate jurisdiction in those courts in all other cases, and the case at bar does not belong to either of these three classes. (*In re Whitener*, 105 Fed. 180, 186, 44 C. C. A. 434, 440; *In re Columbia Real Estate Co.*, 112 Fed. 643, 50 C. C. A. 406; *Fisher vs. Cushman*, 103 Fed. 860, 43 C. C. A. 381, 51 L. R. A. 292; *Hutchinson vs. Leroy*, 113 Fed. 202, 51 C. C. A. 159); and (2) because, as they contend, no appeal may be maintained from any decision which may be superintended and revised in matter of law under section 24b, and the judgment in this case is susceptible of such superintendence and revision. (*In re Worcester County*, 102 Fed. 808, 813, 42 C. C. A. 637; *Hutchinson vs. Leroy*, 113 Fed. 202, 51 C. C. A. 159; *In re Good*, 99 Fed. 389, 39 C. C. A. 581.) They have called attention to some of the cases which have been cited, and some of these cases tend to sustain the premises upon which this argument is based. Nevertheless these premises have never appeared to this court to be sound. The provision for appeals within 10 days from the renditions of the decisions in the three classes of cases treated in in section 25a has never seemed to us to repeal, revoke, or exclude the plenary appellate power vested in the Courts of Appeals by section 24a to review the decisions of separable controversies in reference to the title, posession, or distribution of the estates of bankrupts which the courts of bankruptcy may render in the course

of their proceedings. *Steele vs. Buel*, 104 Fed. 968, 969, 44 C. C. A. 287, 288.

The purpose of Congress in the enactment of the judiciary act of 1891, and the effect accomplished by that law, were to provide an opportunity for a review either in the Supreme Court or in the Circuit Court of Appeals of the final decisions by the Circuit Courts and by the District Courts of all the controversies which they might determine. It was not, in our opinion, the purpose of Congress to strike down any portion of this grant or to impair in any way the appellate jurisdiction thus given by the enactment of the bankruptcy law. On the other hand, the provisions of the bankrupt act clearly show that it intended thereby to preserve this jurisdiction over the controversies to which it had already attached in other cases, and to supplement it with the grant of authority to review the decisions of controversies which had not theretofore been within that jurisdiction. Before the passage of the bankrupt act the Courts of Appeals had appellate jurisdiction of controversies arising in the federal courts over the title to and liens upon the property of insolvents who might become bankrupts. Congress provided by section 24a that the Courts of Appeals should still have jurisdiction over those controversies when they arose in bankruptcy proceedings. By section 25a it granted to the Courts of Appeals additional jurisdiction which before the enactment of the bankrupt law they could not exer-

cise, and provided a different time within which this jurisdiction might be invoked, to the end that the proceedings in bankruptcy might not be unduly delayed. But there is nothing in the provisions of section 25a which excludes, revokes, or diminishes the general appellate jurisdiction granted by the previous section over controversies within the jurisdiction of the Courts of Appeals before the bankruptcy law was passed. The extent of its effect is to grant some additional jurisdiction, and to restrict to 10 days the time within which the jurisdiction of the Court of Appeals may be invoked in the three classes of cases there specified.

Nor is there anything in the grant by section 24b of the power to revise and superintend in matter of law the proceedings of the inferior courts of bankruptcy, which in any way affects or limits the general appellate jurisdiction vested by the sections of the law which have been considered. The act of 1898 does not grant the appellate and the revisory jurisdiction in the alternative. It does not give to disappointed litigants the right of appeal or the right of revision in matter of law. It grants the right of appeal and the right of superintendence and revision in matter of law only. It gives both rights freely and without limitation. The two grants are not inconsistent, and on familiar principles both must stand, and in a proper case either may be invoked.

Any other construction of the bankruptcy law

would deprive litigants in the courts of bankruptcy of a review of the decisions of the most important controversies determined by those courts, of controversies between the trustee and third parties over the title to, and the liens upon the alleged property of the estate. A revision as a matter of law is not equivalant to nor is it adequate to take the place of an appeal. Many controversies of the nature of that here under consideration arise which involve large interests in which there is little doubt of the law, but in which the correctness of the finding of facts is both crucial and doubtful. The act plainly declares that the final decisions of such controversies may be reviewed by appeals, and no persuasive reasons convince that this declaration should not have its full effect.

The late decision of the Supreme Court in *Hewit vs. Berlin Machine Works,* 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986, as we understand it, is an adjudication of this question in accord with these views. In this case the Berlin Works had sold and delivered to the bankrupt certain machines under a contract that the title to them should remain in the corporation until the vendee had performed his agreement to pay the purchase price. The trustee had taken possession of the machines. Thereupon the vendor filed a petition for the possession of the property or for a preference in the payment of the debt of the bankrupt secured by them out of their proceeds. The referee decided that the machines were the

property of the bankrupt, and that the vendor must come in as an unsecured creditor. The district court reversed that decision and adjudged that the machines should be delivered to the vendor or that the trustee should pay to it their value. An appeal from this decision was taken to the Circuit Court of Appeals, and that court affirmed the judgment of the court below. The decision of the District Court in that case was reviewable in the Circuit Court of Appeals by a petition for superintendence and revision as matter of law under section 24b. *In re Rochford,* 124 Fed. 182, 187, 59 C. C. A. 338. That judgment did not fall within either of the three classes of cases specified in section 25a. Nevertheless the Supreme Court held that the claim of the Berlin Works to the machines or to the preference in the payment of its claim out of their proceeds raised a distinct and separable issue, which constituted one of those 'controversies arising in bankruptcy proceedings' over which the Circuit Court of Appeals had appellate jurisdiction in other cases, and it sustained the appeal.

The claim of the appellant in the case at bar is of the same nature, and it was presented in substantially the same way. It was brought to the attention of the court of bankruptcy by a verified statement of the mortgagee which set forth his mortgage, the claim it secured, and the specific property upon which he claimed a lien under it. The issue it presented was whether or not

the mortgage, which was valid between the parties, was voidable by the trustee. That issue was separate and distinct from the general subject matter of the proceedings in bankruptcy, and it presented a controversy of which the Circuit Court of Appeals would have had jurisdiction if it had arisen in any other case in a federal court. The conclusion is that the Circuit Courts of Appeals have jurisdiction to review the final decisions by the courts of bankruptcy of controversies arising between the trustees in bankruptcy and third parties over the title to, or over liens upon the alleged property of the bankrupt or its proceeds under section 24a; that this jurisdiction is not excluded or revoked by the grant of appellate jurisdiction over the three classes of cases specified in section 25a; but the effect of that section is to limit the time within which appeals may be taken in the cases there treated, and to increase to some extent the appellate jurisdiction of the Courts of Appeals; that the general appellate jurisdiction vested by section 24a is not impaired or affected by the grant of the power of revision and supervision in matter of law contained in section 24b; and that the motion to dismiss this appeal must be denied."

To the same effect are:

In re McKenzie, (C. C. A.) 142 Fed. 383.
In re Holmes, (C. C. A.) Fed. 391.
Hendricks vs. Webster, (C. C. A.) 159 Fed. 927.

This same question was discussed in *Burleigh vs. Foreman,* (C. C. A.) 125 Fed. 217, where an appeal had been taken from a decree of the District Court relative to assets claimed by both individual and partnership creditors.

In the course of the opinion, Mr. Circuit Judge Putnam said:

> "Section 2 of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 545, [U. S. Comp. St. 1901, p. 3420], enumerates certain matters over which the courts of bankruptcy are invested with jurisdiction at law and in equity. This gives them undoubted cognizance of the marshaling of assets in the possession of the trustee in proceedings like that underlying this appeal, as was fully explained by us in *Union Trust Company, Petitioner* (C. C. A.), 122 Fed. 937. In this respect the District Courts are not within the prohibition of *Bardes vs. Hawarden Bank,* 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, and of decisions which have followed that case, but their powers are analogous to those exercised by equity courts in marshaling and distributing assets which have come within their control and into their custody. When, however, the equity courts assume a jurisdiction of that character, it is a fundamental rule, so far as the federal tribunals are concerned, that, whenever any party intervening raises a distinct and separable issue or controversy involving substantial pecuniary

rights, an appeal lies. Pursuing that analogy, an appeal should be allowed in the present case. A construction of the bankruptcy act of 1898 which would lead to a different conclusion would be monstrous.

It would give a single judge absolute power over questions of fact concerning estates in bankruptcy, no matter how immense, while no such power exists in any other branch of the federal judicial jurisdiction. Such a result should not be accepted unless the statute furnishes some express provision in that direction, clear and positive. None such exists.

The relief given by the bankruptcy act of 1898 to litigants dissatisfied with the conclusions of the District Court are distinctly threefold: First, there is an appeal provided in section 25, with reference to the specific matters named therein. This was needed if an appeal was to be allowed, as the matters to which it relates could arise in bankruptcy only. Second, section 24b gives the several Circuit Courts of Appeals jurisdiction 'to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction.' Third, section 24a invests them 'with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases.' "

Again, in the case of *Smith vs. Means,* (C. C. A.) 48 Fed. 89, the same question arose over the right o appeal from an order of the District Court approv- ng an order of the referee denying the right of ap- ellant to the possession of a steam shovel. Mr. Cir- uit Judge Baker writing the opinion said:

> "The motion to dismiss is predicated on the assumption that this is a 'proceeding in bankruptcy' and reviewable only under section 24b or 25a. Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]. On the contrary, it is a 'controversy arising in bankruptcy proceedings,' and the appeal was properly taken under section 24a. *In re Friend,* 134 Fed. 778, 67 C. C. A. 500."

The right to appeal from an order directing the ayment of proceeds of sale of a stock of goods to he trustee was involved in *Mason vs. Wolkowich,* (C. C. A.) 150 Fed. 699, and Mr. Circuit Judge Putnam n the course of the opinion said:

> "We are next compelled to meet the question whether we can only revise matters of law on a petition, or whether the whole case may come up on appeal. We have, however, jurisdiction on appeal. In *Hutchinson vs. Otis,* 115 Fed. 937, 941, 53 C. C. A. 419, we cautioned the profession that, theretofore, careful discrimination had not been made in this respect, and that the whole topic was reserved. Later, in *Burleigh vs.*

Foreman, 125 Fed. 217, 60 C. C. A. 109, decided on September 22, 1903, we held that section 24a of the act of July 1, 1898 (30 Stat. 553, c. 541 [U. S. Comp. St. 1901, p. 3431]), which invests 'appellate jurisdiction of controversies arising in bankruptcy proceedings in courts of bankruptcy,' gives appellate jurisdiction over the District Court, sitting in bankruptcy, wherever there is a controversy of a character justiciable in other courts. We pointed out at page 220 of 125 Fed., page 112 of 60 C. C. A., that, like ourselves, the Supreme Court to that time had not discriminated in reference thereto, and observed as follows:

'But, clearly, "proceedings of the several inferior courts of bankruptcy" and "controversies arising in bankruptcy proceedings," as to the latter of which appeals to the Circuit Court of Appeals are expressly allowed by section 24a, may take on entirely different characters.'

* * * * * * * * * *

"About the same time the Supreme Court in *Holden vs. Stratton,* 191 U. S. 115, 118, 119, 24 Sup. Ct. 45, 46 (48 L. Ed. 116), in what was a dictum, made the same distinction between 'bankruptcy proceedings' proper, and 'controversies,' and the opinion observed that 'the provisions of the statute as to revisions of matters of law and appeals were framed, and must be construed, in view of that distinction.' The question, however, arose squarely in *Hewit vs. Ber-*

lin Machine Works, 194 U. S. 296, 300, 24 Sup. St. 727, 48 L. Ed. 994, where the Berlin Machine Works claimed a lien on certain machinery in the possession of the trustee in bankruptcy, and filed a petition in the District Court to establish its claim. The District Court decided in its favor, and the trustee appealed to the Circuit Court of Appeals, and also filed a petition for revision of matters of law. The Supreme Court cited *Burleigh vs. Foreman,* and sustained its conclusions, and also the appeal then before it, which would not have lain if the proceeding below had been by a petition for revision. The same practice, involving a question of a lien of the York Manufacturing Company on property in possession of a trustee in bankruptcy, was followed in all respects in the later case of *York Manufacturing Company vs. Cassell,* 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782.

The only case which apparently contravenes this result is *First National Bank vs. Chicago Company,* 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1056. This, as found in the Court of Appeals, is reported *in Re Rodgers,* 125 Fed. 169, 60 C. C. A. 567. Here it appears that the property in question was sold by the order of the District Court, and the title of the various claimants to it was afterwards determined. The property was held by the Supreme Court not to have been in the possession of the bankrupt at the time the proceedings in bankruptcy commenced, and therefore not reachable by summary pro-

ceedings. The District Court, nevertheless, had taken possession of it and ordered a sale. The Supreme Court, on certiorari to the Circuit Court of Appeals, held that the District Court had no jurisdiction, and that the proceeds of the property should have been returned to the respondents, with the right to litigate in the proper court. It also held that the proper proceeding was by petition for revision; but, in this particular, the court regarded only the order directing a sale. The summary order by a bankruptcy court for a sale, may, perhaps, be held to be merely a 'proceeding in bankruptcy' under the express provisions of the statutes authorizing it. The controversy as to the title to the property which the District Court proceeded to determine after it was sold was not taken cognizance of by the Supreme Court. Of course, there are always liable to arise doubtful cases, where it is a question on which side of the line they fall; that is, whether there is a mere 'proceeding in bankruptcy' or a 'controversy.' That the Supreme Court, in *First National Bank vs. Chicago Company*, regarded the case as one of the former class, cannot controvert the broad distinction laid down by it and ourselves in the decisions referred to. Neither *Hewit vs. Berlin Machine Works* nor *Burleigh vs. Foreman* was cited, nor the slightest indication given of any intention to overrule or modify either of them. Moreover, *York Manufacturing Company vs. Cassell*, which we have already cited, was de-

cided after *First National Bank vs. Chicago Company;* and in *Security Warehousing Co. vs. Hand,* 143 Fed. 32, 38, 74 C. C. A. 186, the Circuit Court of Appeals for the Seventh Circuit explicitly held that *Hewit vs. Berlin Machine Works* was not impaired by *First National Bank vs. Chicago Company.*"

In the opinion handed down in *Security Warehousing Co. vs. Hand,* (C. C. A.) 143 Fed. 32, Mr. Circuit Judge Baker discussing the right to appeal, said:

> "The motion to dismiss the appeal is based on the contention that the record presents a 'proceeding in bankruptcy' and not a 'controversy arising in the course of bankruptcy proceedings.' The distinction was recently considered by this court in the case of *In re Friend,* 134 Fed. 778, 67 C. C. A. 500. The pleadings filed by the appellants in the District Court were in substance bills in equity to establish and enforce their liens and right of possession, and to enjoin the appellees from beclouding their rights and disturbing their possession. The District Court, on the initiative of the appellants, had complete jurisdiction to determine these questions in a plenary suit, which was an independent controversy between adverse claimants and the trustees, and was not a part of the proceedings in the administration of the estate. *Dodge vs. Norlin,* 133 Fed. 363, 66 C. C. A. 425; *Liddon vs.*

Smith, 135 Fed. 43, 67 C. C. A. 517; *Marshall vs. Knox,* 16 Wall. 551, 21 L. Ed. 481; *Stickney vs. Wilt,* 23 Wall. 150, 23 L. Ed. 50; *Hewit vs. Berlin Machine Works,* 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986. The claim of appellees that the authority of the cases above cited is impaired by the decision in *First Nat. Bank vs. Title & Trust Co.,* 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051, is entirely unwarranted. In that case the receiver filed a petition asking the court's directions in respect to a sale of certain property. In the petition the receiver recited that he had taken possession of the property. The adverse claimants appeared specially and objected to the jurisdiction of the District Court to decide the controversy respecting their right of possession. Inasmuch as the adverse claimants were entitled to have their rights determined in a plenary suit, the District Court was without authority to proceed against them summarily, and the District Court could not entertain a plenary suit brought by the trustee, 'unless by consent of the proposed defendant.' Section 23b Bankr. Act July 1, 1898, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431]. The fact that the adverse claimants were entitled to a plenary hearing in a proper tribunal did not touch the other fact that the receiver's petition to the court for instructions respecting a sale of the property was a proceeding in bankruptcy. As the present record discloses a 'controversy arising in the course of bankruptcy proceedings,'

the appeal was properly taken under section 24a (30 Stat. 553 [U. S. Comp. St. 1901, p. 3431]); and the motion to dismiss is accordingly overruled."

The case last above referred to was taken on appeal from the Circuit Court of Appeals to this court, and there affirmed.

Security Warehousing Co. vs. Hand, 206 U. S. 415.

In *Hinds vs. Moore,* (C. C. A.) 134 Fed. 221, where the right to appeal from an order to pay the value of goods delivered to claimant by the bankrupt was questioned, Mr. Circuit Judge Lurton said:

"The motion of the appellee to dismiss the appeal must be denied. The motion is grounded upon the contention that the proceeding is not an appeal under section 25, Bankr. Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], nor an appeal such as is cognizable under the general appeal powers of this court from 'controversies arising in bankruptcy proceedings,' under section 24a (30 Stat. 553 [U. S. Comp. St. 1901, p. 3431]), but, if reviewable at all, is so only under section 24b, giving this court revisory and superintending powers over 'the proceedings of the several inferior courts of bankruptcy,' etc. That this is not an appeal in one of the special cases mentioned in section

25a must be conceded. The petition of the trustee, and the answer of the defendant thereto, raised a distinct and separable controversy over certain property adversely held and claimed by the defendant thereto. It may therefore be well treated as one of those 'controversies arising in bankruptcy proceedings,' over which this court may exercise general appellate jurisdiction, as in other cases under section 24a. *Hewit vs. Berlin Machine Works*, 194 U. S. 296, 300, 24 Sup. Ct. 690, 48 L. Ed. 986; *In re First National Bank of Canton* (decided by this court at present session), 135 Fed. 62; *Boonville Bank vs. Blakey*, 107 Fed. 891, 47 C. C. A. 43; *Steele vs. Buel*, 104 Fed. 968, 44 C. C. A. 287."

In *McCarty vs. Coffin*, (C. C. A.) 150 Fed. 307, the question involved was as to the right of a trustee to have a deed executed by the bankrupt cancelled. A decree was entered by the District Court cancelling the deed. From this decree an appeal was taken to the Circuit Court of Appeals. Mr. Circuit Judge Shelby in the course of the opinion said:

"The appellee has moved to dismiss the appeal. The grounds of the motion in brief are that an appeal does not lie in this case; that this is a summary proceeding, and is a 'proceeding in bankruptcy,' as distinguished from a controversy in law and in equity arising in the course of bankruptcy proceedings. We consider

this motion before stating the case on its merits.

The foregoing statement of the allegations of the petition which began this suit shows it to be in substance one to cancel the title held by McCarty and to decree that the title was in Coffin as trustee. The petition is variously called by the parties in the subsequent proceedings a motion, a summary proceeding, and a bill. It is not written with that technical skill and proper formality usually found in a bill to cancel an adverse conveyance and to vest title in the complainant, but we find in the pleading all the necessary averments, and it concludes, if not with the usual prayer, by asking the court to grant the relief sought. The suit raises a distinct and separable issue, and is one of those 'controversies arising in bankruptcy proceedings' over which the Circuit Courts of Appeals have appellate jurisdiction under section 24a of the bankruptcy act of 1898 (Act. July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3431]). The case does not fall within section 25a, which relates to appeals from judgments in certain enumerated steps in bankruptcy proceedings. *Hewit vs. Berlin Machine Works*, 194 U. S. 296, 300, 24 Sup. Ct. 690, 48 L. Ed. 986; *Dodge vs. Norlin*, 133 Fed. 363, 66 C. C. A. 425. The motion to dismiss the case is overruled."

Mr. Circuit Judge Lurton discussed the distinction between "proceedings in bankruptcy" and "controversies arising in bankruptcy proceedings" in *In*

re McMahon, (C. C. A.) 147 Fed. 684, and in the course of his opinion used the following language:

> "The distinction between cases which are 'proceedings in bankrupty' under section 24b and those which are 'controversies arising in bankruptcy proceedings' and appealable under the general appellate jurisdiction of the court as confirmed by section 24a is not always clear nor easily stated. Between *Hewit vs. Berlin Machine Works* and *First National Bank of Chicago vs. Chicago Title & Trust Co.* there is this distinction: In the first case the stranger voluntarily came in and set up a claim against property in possession of the bankrupt's trustee. Very clearly that made one of those independent controversies which may arise in a bankruptcy proceeding or in any other where the res is in custodia legis and was appealable under section 24a. In the later case the same kind of issue arose, but it arose upon the application of the trustee for an order of sale and as incident to that the determination of a claim against the property held by one not a party to the proceeding. The latter is plainly held to be a 'proceeding in bankruptcy' not appealable, but reviewable in matters of law only upon an appeal to the supervisory powers of the Court of Appeals under section 24b. The distinction we recognize and apply in this case by holding that the proper and only mode of correcting error in the case was through the supervisory powers of this court,

and that the petitioner resorted to the right remedy though he had no wrong to redress."

To the same effect is *In re Mueller,* 135 Fed 711.

Even under the distinction drawn and rule laid down in the *In re McMahon case, supra,* the case at bar was appealable under Section 24a, for the reason that appellee took the initiative and set up a claim to property in the trustee's hands.

Of the cases cited on page 9 in the brief for appellee, touching the question of jurisdiction on appeal, the following were decided before May 16th, 1904, the date of the decision of *Hewit vs. Berlin Machine Works, supra,* and no consideration was given to Section 24a:

In re Worcester County, 102 Fed. 808,
In re Whitener, 105 Fed 180,
In re Abraham, 93 Fed. 767,
In re Rouse Hazard & Co., 91 Fed. 96.

While in *Morgan vs. Bank,* 145 Fed. 466, *In re First National Bank of Louisville,* 155 Fed. 100, *In re Cosmopolitan Power Co.,* 137 Fed. 858, and *Gaudette vs. Graham,* 164 Fed. 311, all of which were decided after May 16th, 1904, no consideration is given or reference made to the Hewit-Berlin Machine Works case whatever.

The other two Circuit Court of Appeals cases

cited, *In re Mueller,* 135 Fed. 711, and *In re McMahon,* 147 Fed. 684, have already been referred to and do not in any way bear against the right of the trustee to appeal.

The right of appeal under Section 24a does not seem to have been considered in *Hutchinson vs. Otis,* 190 U. S. 552, which was decided about a year before *Hewit vs. Berlin Machine Works, supra,* and cannot be considered as an authority against the right of the trustee to appeal in this case.

The case of *First National Bank of Chicago vs. Co.,* 198 U. S. 280, simply holds that no appeal lies from a decree of a District Court entered on a receiver's petition for directions respecting a sale, etc., and the case of *Hewit vs. Berlin Machine Works, supra,* was not referred to, showing that there was no disposition to change the rule laid down in that case.

Counsel for appellee is in error in assuming that this case was appealed under the provisions of Section 25a. Counsel for the trustee have at all times believed that the right of appeal existed on the question of the validity of the mortgage and regardless whether there was a dispute as to the amount due on the mortgage or not.

This belief was based on Section 24a and *Hewit vs. Berlin Machine Works case, supra,* which was

decided just before the commencement of this litigation.

It is true that in some cases the right to a lien is undoubted, while the amount is in dispute, but in this case the right to have the mortgage sustained has always been denied, and the assignments of error and briefs filed in the appellate court and in this court, show beyond doubt what has been the paramount issue.

The case having been properly reviewed on appeal in the Circuit Court of Appeals, the appeal to this court then followed under Section 6 of the act of March 3, 1891, [26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, pp. 549, 550.].

Hewit vs. Berlin Machine Works, supra.

Counsel earnestly urges that the case last cited justified the belief that this case was appealable and the trustee is entitled to have the case heard on its merits.

Respectfully submitted,

MYRON L. LEARNED,

Attorney for Appellant.

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

October Term, 1907.

No. 93.

JOSIAH CODER, TRUSTEE OF THE ESTATE OF ALEXANDER ARMSTRONG, BANKRUPT, *Appellant*,

vs.

WILLIAM ARTS, *Appellee*.

Appeal From the United States Circuit Court of Appeals for the Eighth District.

BRIEF FOR APPELLEE.

GEORGE S. WRIGHT,
ROBERT E. O'HANLY,
Attorneys for William Arts

Supreme Court of the United States

October Term, 1907.

No. 324.

JOSIAH CODER, TRUSTEE OF THE ESTATE OF ALEXANDER ARMSTRONG, BANKRUPT, *Appellant*,

vs.

WILLIAM ARTS, *Appellee*.

Appeal From the United States Circuit Court of Appeals for the Eighth District.

BRIEF FOR APPELLEE.

Statement of the Case.

This case presents a story of absorbing interest, involving, as it does, the life work of Wm. Arts and his boys, big-hearted, honest German bankers, and the safety and integrity of their little bank, the center of a peaceful German community in Carroll County, Iowa.

Alexander Armstrong came to Carroll County, engaged in the business of farming and stock raising and became and was looked up to as the wealthy and most prosperous man of the community. Possessing some 2,500 acres or more of land, cultivated and stocked with fat cattle and hogs, Mr. Armstrong's reputation for integ-

rity and financial responsibility stood the highest in the community, he being reputed to be worth over $250,000.00.

He had been a friend of Willian Arts for many years, did his banking business with a bank in which Mr. Arts was interested, and in the year 1900, shortly after Arts organized a private bank in Carroll, called the German-American Bank, Armstrong transferred his account to that bank and became a large borrower from him. As early as 1900, Arts had loaned $28,000 to Armstrong, and from that time until the mortgage in controversy herein was made, he continued to loan him money in amounts ranging from $20,000 to a few thousand dollars at a time, and to renew old loans until, on May 2d, 1904, Armstrong owed him upon his promissory notes $98,503.32, and was overdrawn about $2,000 in his bank.

As before suggested, Armstrong had the reputation of being one of the wealthiest men in Carroll County. He was illiterate, being able to read printed characters, but written ones with difficulty, if at all. He held the title to 2,440 acres of land in Carroll County; to 612½ acres in Monona County; to a residence in the town of Glidden, for which he paid $12,000.000; 200 or 300 head of cattle, some thirty horses and a large number of hogs and farm machinery.

There were mortgages on some of these lands, but they amounted to but a small proportion of the value of the real estate.

In July, 1903, Armstrong had made a statement to Arts, in which he estimated the value of his property at $220,000.00, mentioning one $5,900.00 mortgage.

The capital of Arts' bank was $50,000.00 and he had loaned to Armstrong this $98,503.32 without any security.

During the spring of 1904, William Arts was taken seriously ill; his life was despaired of, and one of his sons, Frank Arts, was summoned to Carroll from Nebraska, where he was engaged in the mercantile business, to attend him in his illness. While he was at Carroll, he and W. A. Arts, another son, who was cashier of the bank, examined the loans made by their father and he suggested that it was not good business policy to have such a large indebtedness against one man, unsecured, that in the event of his father's death, this would be discovered, and that the interests of the bank demanded that this loan should be secured.

One of the sons, therefore, telephoned to Armstrong, who lived several miles distant and asked him to come to the bank.

He came in the next morning and the boys expressed their wish to him and the reason for it.

He expressed his willingness to do anything they desired and told them he would go home and send them his tax receipts and that they could select what security they wanted, and this was done and they caused a mortgage to be drawn. Four or five days later, on May 2, 1904, he and his wife came in and executed it.

Wm Arts, the father, who by this time was convalescent, came to the bank the next day, was advised of what had been agreed to and done, ratified the transaction, and himself took the mortgage to the office of the Recorder of the County, and had it recorded therein.

At the time this mortgage was made, Armstrong was overdrawn in the bank about $2,000.00, and no security was taken for this overdraft, nor was it paid.

He continued to draw checks upon the bank, and

during the month of May and part of June, Arts paid out for him without further security, $3,000.00 more.

On July 27th, 1904, Alexander Armstrong filed a voluntary petition in bankruptcy. On the evidence as presented to the Court, the Hon. Smith McPherson, Judge, found: (Record, p. 19)

> *"That at the time of the giving of the said mortgage, to-wit: On May 2, 1904, the said Armstrong did not know that he was insolvent, nor did he intend to prefer the said Arts over any other creditor, nor did he, by the giving of said mortgage intend thereby to give a preference, nor did said Armstrong intend that said Arts should thereby be enabled to obtain a greater per cent. of his claim than any other creditor would receive. That at said time, neither the said Arts nor any of his agents knew that the said Armstrong was then insolvent, nor had any knowledge of his insolvency, nor had reasonable cause to believe that the said Armstrong was then insolvent, and that at the time of the giving of the said mortgage neither the said Arts nor any of his agents had reasonable cause to believe that it was intended thereby to give a preference, nor that said Armstrong, by the giving of said mortgage, intended thereby to give a preference or intended to enable Arts to obtain a greater percentage of his debt than any other creditor of the same class of Armstrong would be paid or receive, nor did the said Arts or any of his agents, at the time of the taking of said mortgage, have any knowledge with reference to the true financial condition or otherwise of the said Armstrong such as would have put an ordinary prudent man upon inquiry, from which the said Arts, or his agents could or should have discovered that the said Armstrong was at the time in fact insolvent. Nor could the said Arts, nor any of his agents by the exercise of reasonable diligence and*

prudence have discovered such facts as would have disclosed the actual financial condition of the said Armstrong."

As to the findings of the Trial Court, the Court of Appeals speaking through Judge Sanborn in *Coder vs. Arts,* 152 Fed., 943, 946, says:

> "When the Court has considered conflicting evidence and made a finding or decree, it is presumptively correct and unless some obvious error of law has intervened or some serious mistake of fact has been made, the finding or decree must be permitted to stand. Citing:
>
> *Warren vs. Burt*, 58 Fed., 101, 106.
> *Parson vs. Brown*, 61 Fed., 874, 879.
> *Stewart vs. Hayden*, 72 Fed., 402, 406.
> *Fitchett vs. Blows*, 74 Fed., 47, 51.
> *Telghman vs. Proctor*, 125 U. S., 136.
> *Kimberly vs. Aims*, 129 U. S., 512.
> *Farrer vs. Ferris*, 145 U. S., 132. 134.

Armstrong having been adjudicated bankrupt and a trustee appointed, Arts filed a statement of his claim with the referee in bankruptcy setting up his mortgage security, and alleging that said mortgage was a valid lien on the property described therein. The trustee thereupon filed objections to the claim, denying that Armstrong was indebted to Arts in the amount claimed, and denying the validity of the mortgage and asking that it be declared null and void.

The referee made certain findings of fact and certified them to the District Court. In these findings he found the amount due from Armstrong to Arts at the time of filing the petition in bankruptcy. Both parties then filed petitions for review by the District Court, but

no exception was taken to the findings of the referee as to the amount due, and thereafter that question was out of the case, the subsequent contest turning merely on the validity of the mortgage. (Record, pp. 11-15.)

On hearing, the District Court found that the mortgage was valid, and ordered that Arts be paid out of the proceeds of the sale of the mortgaged property, possession of which had been taken by the Court.

The trustee thereupon appealed to the Court of Appeals for the Eighth Circuit on the sole proposition that the District Court erred in holding the mortgage valid. A hearing was had in the Court of Appeals, and the case submitted, neither side asking the Court to make findings of fact or conclusions of law, in contemplation of possible appeal from an adverse decision, as provided by General Order in Bankruptcy No. XXXVI.

On April 3d, 1907, the Court of Appeals rendered a final decree affirming the decree of the District Court finding the mortgage valid.

Subsequently, and on April 29, 1907, the trustee appeared before the Court by his attorney, and prayed that findings of fact and conclusions of law be made by the Court and filed *nunc pro tunc* as of April 3, 1907, the date of the final decree, which was done. The following day, April 30, 1907, the trustee prayed and was allowed an appeal to this Court.

I.

OBJECTIONS TO THE JURISDICTION.

Before considering the merits of this case, appellee desires to object to the jurisdiction of this Court, and moves to dismiss the appeal or affirm the judgment below, on the following grounds:

(a) No appeal lay from the action of the District Court to the Court of Appeals under Section 25-a of the Bankrupt Act or otherwise, hence there can be no appeal from the Court of Appeals to this Court.

(b) No appeal lies from the decision of the Court of Appeals, under Section 25-b of the Bankrupt Act or otherwise, because the question of allowance or rejection of a claim is not involved.

(c) No appeal lies from the decision of the Court of Appeals, under Section 25-b of the Bankrupt Act or otherwise, because the question involved is not one that might have been taken on appeal or writ of error from the highest Court of a state to this Court.

(d) No findings of fact or conclusions of law were requested by the appellant or made or filed by the Court of Appeals at or before the rendition of its final decree.

(e) Such final decree is not appealable.

(a)

NO APPEAL LAY FROM THE DISTRICT COURT TO THE COURT OF APPEALS, UNDER SECTION 25-a OF THE BANKRUPT ACT OR OTHERWISE, HENCE THERE CAN BE NO APPEAL TO THIS COURT.

The trustee claimed the right of appeal to the Court of Appeals from the District Court, under the 3d clause of Section 25-a of the Bankrupt Act allowing appeals.

> "(3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over."

An examination of the record will show that this is not such a case, and that the point on which the trustee

appeals from the District Court had nothing whatever to do with the matter of allowance or rejection of a claim. There were originally two questions involved. Arts filed his claim against the estate, claiming he had a provable debt against it. Whether he had a provable debt and the amount thereof was the first question. In addition he claimed that he was entitled to priority and had a mortgage lien on certain property belonging to the estate. This was the second question involving the matter of the administration of the estate. The trustee filed objections to both claims, resisting the amount of the alleged provable debt, and also resisting the claimed lien and claiming it was invalid. For convenience these two questions were litigated before the referee together, the question both as to the amount of the provable debt, and whether the claimant had a valid lien or not.

The referee, after taking evidence on both matters, made certain findings, included in which was a finding as to the amount due from the estate to Arts. The trustee thereupon filed a petition for review of the findings of the referee by the District Court, but in that petition no objection was made to the amount of the provable debt, and at no time thereafter, whether before the referee, the District Court, the Court of Appeals, or this Court, has any claim been made but that the claim was properly allowed against the estate. The sole and only objection urged is that it is claimed the District Court erred in holding Arts' mortgage lien valid and giving him priority as to the amount of his claim in the distribution of the fund arising from the sale of mortgaged property, assets of the estate, a matter involving purely and simply the administration of the bankrupt estate.

In connection with such matters, it is clear that, under the Bankrupt Act, no right of appeal is granted, but that the trustee's remedy, if he felt aggrieved by the District Court's decision, was by application to the Court of Appeals "to superintend and revise in matter of law" the decree of the District Court, under Section 24-b of the Act.

This rule has been announced many times in decisions by this Court and the various Circuit Courts of Appeals. All the Court of Appeals, which have passed on this question, six in number, are unanimous in so construing the Bankrupt Act.

First Circuit:

In re Worcester County, 102 Fed., 808.

Fourth Circuit:

Morgan vs. Bank, 145 Fed., 466.

Fifth Circuit:

In re Whitener, 105 Fed., 180.
In re Abraham, 93 Fed., 767.

Sixth Circuit:

In re Mueller, 135 Fed., 711.
In re First Nat. Bank of Louisville, 155 Fed., 100.
In re McMahon, 147 Fed., 684.

Seventh Circuit:

in re Rouse, Hazard & Co., 91 Fed., 96.
In re Cosmopolitan Power Co., 137 Fed., 858.

Ninth Circuit:

Gaudette vs. Graham, 164 Fed., 311.

The rule has been approved by this Court in

Hutchinson vs. Otis, 190 U. S., 552, 555.
First Nat. Bank vs. Co., 198 U. S., 280.

The latest reported decision is by the Court of Appeals for the Ninth Circuit in a case identically similar to the case at bar:

Gaudette vs. Graham, supra.

In that case the claimant filed a claim against the bankrupt estate, alleging that it was indebted to him in a certain amount, and also claiming therefor a lien on certain property of the estate. The trustee objected to the entire claim and also objected to the allowance of the claimed lien. The District Court allowed the entire claim, but held that the claimant had a valid lien only for a portion thereof. Thereupon the claimant appealed to the Court of Appeals asking that the action of the Court denying him a lien as to the balance be reversed. On this record the Court of Appeals held they could not consider the question on appeal, and that claimant's remedy was by petition for revision on matter of law. There is no substantial difference between that case and the case at bar. The only difference is that in that case the claimant appealed from an order denying him a lien on certain property of the estate, and in the case at bar the trustee appealed from an order allowing such a lien.

A similar ruling was made by the Court of Appeals for the First Circuit, in a case in which the following language is used:

> "On the whole, Congress having provided specifically in the Act of 1898 for an appeal with reference to proofs of debt exceeding $500.00, on which appeals all question are open to the appellate tribunal, and having also provided that for all *matters of administration* which concern the relations to each other of the different interests in the estate, the action of the

bankruptcy court shall be revised only in matters of law, it is plain that Congress insisted on a distinction of a substantial nature, which we are not at liberty to disregard. Whether or not the County of Worcester has any debt provable belongs to the first class. Whether or not it has any debt as to which it is *entitled to priority is a question of administration,* which can ordinarily present no question of importance, except of law, arising from facts which can rarely be disputed. Therefore it belongs of right to the second class. The fact that, for convenience, the learned judge of the District Court combined both questions on one decree, can in no way affect the substantial distinctions which Congress has made between the mere power to revise and a full appeal. We therefore must sever what the District Court has apparently combined. Inasmuch as the trustee maintains that the County of Worcester has no debt which it can prove for any purpose against the bankrupt estate, we must dispose of that question on the appeal; and inasmuch as he also claims that, even if the county has a provable debt, it is not *entitled to any priority,* we must dispose of that question on the *petition for revision.*"

In re Worcester County, 102 Fed., 808, 812, 42 C. C. A. 637.

"*In re Worcester County,* just quoted from, as well as *In re Rouse, Hazard & Co.,* 91 Fed., 96, 33 C. C. A. 356, were referred to with approval by the Supreme Court in the case of *Hutchinson vs. Otis,* 190 U. S., 552, 555."

Gaudette vs. Graham, supra.

The above principle has been approved by this Court in the case of *Hutchinson vs. Otis, supra,* a case involving also the question of a lien on property of the bankrupt estate, in which it is said:

"The Circuit Court of Appeals held that this portion of the decree of the District Court was not subject to an appeal to the Circuit Court of Appeals. The argument chiefly relied upon by the appellant is that this is an intervening petition to reach a fund in Court, and is not a *proceeding in bankruptcy.* Under the circumstances of this case it seems to us that the petition was incident to the claim, *Cunningham vs. German Insurance Bank,* 101 Fed. Rep., 977, and *was* a bankruptcy proceeding under Section 2, cl. 7, within the meaning of Section 25 regulating appeals in bankruptcy proceedings, and that the decree upon it was not 'a judgment allowing or rejecting a debt or claim of five hundred dollars or over' within Section 25-a, 3, and was not an independent ground of appeal. See *In re Whitener,* 105 Fed., 180, 186; *In re Worcester County,* 102 Fed. Rep., 808, 813; *In re Rouse, Hazard & Co.,* 91 Fed. Rep., 96; *In re York,* 4 N. B. R., 479, 483."

Hutchinson vs. Otis, 190 U. S., 552, 555.

"The case being here on appeal respecting the *amount* of the claim, we think appellant may also present any question concerning the security or rank of the debt, as an incident thereof (*Cunningham vs. German Insurance Co.,* 103 Fed., 932, 43 C. C. A. 377), though the question of *lien or priority,* if *alone* involved, could be reviewed *only* under Section 24-b (*In re Rouse, Hazard & Co.,* 91 Fed., 100, 33 C. C. A. 356)."

In re Cosmopolitan Power Co., supra.
(Court of Appeals, Seventh Circuit.)

"The order complained of is one made by the referee and approved by the District Judge, setting aside an allowance of a secured claim of the First National Bank of Louisville, and requiring it to pay

to the trustee $1,000, which, it was held, the bank had received from the bankrupt through an unlawful preference. The order was therefore one made in the *bankruptcy proceedings proper,* and not an independent controversy arising in such proceedings, and is reviewable here upon the *petition for revision* under Section 24-b of the Act of July 1, 1898. Accordingly the *appeal* is dismissed."

In re First Nat. Bank of Louisville, supra.
(Court of Appeals, Sixth Circuit.)

It thus appearing that the trustee had no right of appeal to the Court of Appeals, and that the assumption of jurisdiction by the latter Court was without warrant under the Bankrupt Act, it must follow that there is no authority for this appeal from the Court of Appeals to this Court, and the appeal should be dismissed.

(b)

NO APPEAL LIES FROM THE DECISION OF THE COURT OF APPEALS, UNDER SECTION 25-b OF THE BANKRUPT ACT OR OTHERWISE, BECAUSE THE QUESTION OF ALLOWANCE OR REJECTION OF A CLAIM IS NOT IVOLVED.

The appeal to this Court is founded on the following provision of the Bankrupt Act:

"From any final decision of a Court of Appeals, *allowing or rejecting a claim* under this Act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases, and no other:

"1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question

involved is one which might have been taken on appeal or writ of error from the highest Court of a state to the Supreme Court of the United States."

It is clearly shown above that the question involved in this case has nothing to do with the rejection or allowance of a claim, but has purely and simply to do with a matter of the administration of the bankrupt estate, concerning which this Court has no jurisdiction in the matter of appeal either from the District Court or Court of Appeals. For the reasons set forth in the foregoing division of this brief why an appeal did not lie from the District Court to the Court of Appeals, it is manifest that an appeal would not lie from the Court of Appeals to this Court, under Section 25-b, and the appeal should be dismissed.

(c)

NO APPEAL LIES FROM THE DECISION OF THE COURT OF APPEALS, UNDER SECTION 25-b OF THE BANKRUPT ACT OR OTHERWISE, BECAUSE THE QUESTION INVOLVED IS NOT ONE THAT MIGHT HAVE BEEN TAKEN ON APPEAL OR WRIT OF ERROR FROM THE HIGHEST COURT OF A STATE TO THIS COURT.

In this connection we desire merely to cite, as decisive of this question the case of

Chapman vs. Bowen, 207 U. S., 89.

We contend there is no difference in principle, as far as this question is concerned, between that case and the case at bar. This Court said in that case: "We are not able to perceive that a writ of error from the highest

Court of a state to this Court could be maintained," hence the appeal was dismissed. The same is true of the present case.

An analysis of the Bowen case will establish the precise similarity between it and the case at bar. It appears that Bowen held a note signed by the firm of McCoy & Co., and by a member of said firm, Alfred McCoy. The firm and Alfred McCoy both being adjudged bankrupt, Bowen filed a claim against the firm's estate for the full amount, and against Alfred McCoy's estate for any deficit. The trustee of the latter estate objected to the allowance of the claim, basing his objection on what he claimed was the proper interpretation of a clause in the bankruptcy act, being subd. "f" of Section 5, quoted in the opinion of the Court of Appeals in the case. (*In re McCoy*, 150 Fed., 106, 108.)

In the case at bar, so far, the facts are similar. Arts filed a claim against the Armstrong estate, claiming a lien on certain property belonging to the bankrupt. The trustee thereupon resisted the claim, basing his objection on what he claimed was the proper interpretation of certain clauses in the Bankrupt Act, to-wit: Sections 60-b and 67-e. In both cases the trustees relied in defense on portions of the Bankrupt Act, and what they claim was the proper interpretation thereof.

Continuing the parallel: In the Bowen case, the Court of Appeals, interpreting subd. "f" of Section 5 above, decided that the trustee's defense, founded on that subdivision, was not good, and Bowen's contention was sustained. In the case at bar, the Court of Appeals, interpreting Sections 60-b and 67-e of the Bankrupt Act, decided that the trustee's defense, based on said Sections, was not good, and Arts' claim was sustained.

In the Bowen case, under the facts stated, it was held that an appeal would not lie to this Court, for the reason above mentioned, and it must follow that in the case at bar an appeal will not lie, and the appeal should be dismissed.

(d)

NO FINDINGS OF FACT WERE REQUESTED BY THE APPELLANT OR MADE OR FILED BY THE COURT OF APPEALS AT OR BEFORE THE RENDITION OF ITS FINAL DECREE.

Clause 3 of General Order in Bankruptcy No. 36, provides:

> "In every case in which either party is entitled by the Act to take an appeal to the Supreme Court of the United States, the Court from which the appeal lies shall, *at or before the time of entering its judgment or decree,* make and file a finding of facts and its conclusions of law, thereon, stated separately, etc."
>
> *Chapman vs. Bowen, supra.*

It appears in this case that no findings of fact or conclusions of law were filed by the Court of Appeals "at or before the time of entering its judgment," nor had the appellant requested the Court to make and file such findings and conclusions. We submit that under the decision in *Chapman vs. Bowen, supra,* the appeal should therefore be dismissed. It is true the record shows certain findings and conclusions filed *nunc pro tunc* as of the date of the rendition of the judgment. However, we do not understand this to be a compliance with General Order No. 36 promulgated by this Court. The rule says

distinctly that the Court shall make and file the findings and conclusions *"at or before* the time of entering its judgment or decree," and it cannot be a compliance with this rule to make and file them nearly a month after, with an order that they shall be filed as of the date of the judgment. If this practice is approved, it renders entirely nugatory the rule of this Court that the findings and conclusions must be made and filed at or before the time specified, and renders such rule a dead letter. We do not understand that the failure to file findings and conclusions was due to any act or neglect of the Court of Appeals, nor that it is the duty of that Court to determine in every case in advance of the decision, in the absence of request of counsel, whether a case is appealable to this Court or not. We believe it is the duty of a litigant, if he contends that if defeated, he has the right of appeal, to call the attention of the Court of Appeals to the matter at the time of the submission of the case and make a request for findings and conclusions. The present appellant not having done so, we believe he cannot complain of the Court's failure to make and file findings and conclusions at the time specified, nor was he entitled to relief against his own oversight. These views, we think, find support in the decision of the Court of Appeals of the Seventh Circuit in the case of *Knapp vs. Milwaukee Trust Co.,* 162 Fed., 675.

In its opinion, that Court says:

> "At this time it is enough to say that we do not understand that Section 3 of General Order No. 36 intends that a Circuit Court of Appeals shall, *of its own motion,* ascertain and determine in advance of the decision upon an appeal in bankruptcy, whether

a question is raised upon which a party is entitled to allowance of an appeal to the Supreme Court. If such right is claimed, it should be called to attention, as we believe, in advance of decision, with request for findings in the event of adverse ruling upon the question alleged to be appealable." (Page 677.)

(e)

SUCH FINAL DECREE IS NOT APPEALABLE.

The final decree appealed from is as follows:

"On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the District Court, in this cause, be and the same is hereby affirmed with costs, *except* as modified relative to the question of interest, upon the petition for review. *In re William Arts*, Petitioner No. 74, Original, which was submitted and decided herewith, etc."

We contend that this decree cannot be appealed from this Court. It states that the decree of the District Court is affirmed except as modified in another case. Upon this record we submit there is not enough before this Court for it to pass judgment intelligently in the matter. The record does not show what the modification of the judgment of the District Court, made in the other case, was, and that case is not before the Court. Hence this Court cannot decide what judgment should be rendered, and the appeal should be dismissed.

II.

BRIEF OF THE ARGUMENT.

Coming to the merit of the case—Counsel for appellant trustee relies solely for a reversal of this case upon

the following provision of Section 67-e of the Bankrupt Act, to-wit:

> "That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged bankrupt under the provisions of this act subsequent to the passage of this act, and within four months prior to the filing of the petition, *with the intent and purpose on his part to hinder, delay or defraud his creditors,* or any of them, shall be null and void as against the creditors of such debtor."

Counsel's argument, when analyzed, amounts to this:

The Court, in its findings, has found that Armstrong was insolvent at the time he gave the mortgage in question, and that he knew he was insolvent. Therefore, first, Armstrong made the mortgage with intent to prefer Arts over his other creditors. Therefore, second, he made the mortgage with intent to hinder, delay or defraud such other creditors.

The mere statement of these conclusions would seem all that is necessary to show their fallacy to the legal mind. Counsel cites authorities in support of his first conclusion above, that under the circumstances an intent to prefer will be presumed, but cites none supporting his second conclusion, that an intent to hinder, delay or defraud will be presumed as well, nor can he cite any. There are none. Surely an intent to prefer and an intent to hinder, delay, or defraud, are different. Surely it does not follow because a debtor, though insolvent, has the intent to secure one creditor he thereby has the intent to hinder, delay or defraud other creditors. If counsel's contentions were sound, in none of these United States, ir-

respective of the Bankrupt Law, could an insolvent debtor secure a creditor, for in all the states there are laws against conveyances made with intent to hinder, delay and defraud creditors.

Upon this branch of the case the Court of Appeals in *Coder vs. Arts,* 152 Fed., 943, 947, has well said:

> "The contention that the intent to hinder, delay and defraud other creditors must be inferred from the fact that the inevitable effect of the mortgage was to deprive them of the opportunity to collect their claims in full, and from the rule of law that every one is presumed to intend the natural and probable effect of his acts, is not tenable here. It is every intent to hinder, delay or defraud creditors unlawfully only, not every intent to hinder or delay them, that avails to avoid a transfer made for a pre-existing debt under Section 67-e. An insolvent debtor until the commencement of proceedings in bankruptcy still has the *jus disponendi* of his property. He has the right to secure and pay his debts with it, and he has the right to secure and pay one creditor in preference to others, provided always the security or payment is not violative of any of the Acts of Congress or of any of the statutes of the state. A preference of one creditor over others by such a payment or by such security, which is free from actual and intended fraud, and from any purpose to affect other creditors injuriously, beyond the necessary effect of the security or the payment, is valid and lawful, and it cannot evidence such an intent to hinder, delay and defraud as will make it void or voidable under Section 67-e. Every mortgage necessarily tends to hinder or delay creditors other than the mortgagee, but a delay necessarily resulting from a fair and honest exercise of the right to dominion over one's property, and to pledge or otherwise dispose of it,

is neither an unjust nor unlawful interference with the rights of others and is not within the terms of the statute making void conveyances intended to hinder or delay creditors.

"*Sabin vs. Columbia River Lumber & Fuel Co.,* 34 Pac., 695, 25 Or. 15, 42 Am. St. Rep., 756; *Lampson vs. Arnold,* 19 Iowa, 479, 484, 485; *Stewart vs. Dunham,* 115 U. S., 61, 66, 5 Sup. Ct., 1163, 29 L. Ed., 329. A transfer made in good faith to pay or to secure an honest antecedent debt by an insolvent within four months of the filing of a petition in bankruptcy by or against him constitutes no evidence of an intent on his part to hinder, delay or defraud other creditors, within the meaning of Section 67-e of the Bankruptcy Law, notwithstanding the fact that its necessary effect is to hinder and delay them, and to deprive them of the opportunity they might otherwise have had to collect their claims in full."

Counsel for trustee devotes many pages of his brief to quotations from the Congressional Records and convinces himself thereby that Congress intended "that all liens of any description, obtained upon property of a bankrupt, within four months of adjudication in bankruptcy, should be null and void, except liens protected under the provisions of Section 67-d."

A sufficient answer to all this is that if Congress had so intended it would have so stated. Very few words would have accomplished this object, but it has not so stated and did not so intend. Again, counsel's prior argument contradicts his claim quoted above. He does not argue that "*all* liens" obtained within the four months are void, but only liens given by one *knowing* himself to be insolvent at the time, an entirely different matter. Counsel is as loose in his method of expression as the

Conference Committee in their report quoted on page 27 of his brief.

Section 67-e cannot in any possible way be distorted so as to give the meaning contended for. Congress did not say: "All *incumbrances* of his property made by an *insolvent person* adjudged a bankrupt * * * * within four months prior to the filing of the petition, shall be null and void etc."

But,

"All *conveyances, transfers, assignments* or *incumbrances* of his property * * * made by a person adjudged a bankrupt * * * within four months prior to the filing of the petition, *with the intent and purpose on his part to hinder, delay or defraud his cerditors, shall be null and void, etc.*"

That Congress in the face of all the record relied on by counsel saw fit to pass Section 67 in the form and language as we now find it, is the strongest argument against his contention and convinces us that counsel has entirely misconstrued the object and purpose of the above quoted portion of Section 67-e.

It has absolutely nothing to do with a preference honestly given by a debtor to one of his creditors. The object simply was to render void all transactions within four months of bankruptcy which were tainted with actual fraud, transactions whereby it was the purpose of the bankrupt to actually cheat and defraud his creditors. The words "hinder, delay or defraud creditors" have a well defined and well understood meaning, refer only to transactions in which actual fraud is involved, and have never been understood as applying to cases wherein the debtor honestly and in good faith secures a creditor by giving

him a mortgage, even though the giving of such mortgage, may result in preferring the creditor over other creditors.

This distinction is clearly kept in mind throughout the whole Bankruptcy Act, and is especially made manifest in the provisions defining acts of bankruptcy. In Section 3 it is said that acts of bankruptcy by a person shall consist of his having "(1) conveyed, transferred, concealed or removed, or permitted to be concealed or removed any part of his property, *with intent to hinder, delay or defraud his creditors,* or any of them; or (2) transferred, *while insolvent,* any portion of his property to one or more of his creditors *with intent to prefer such creditors over his other creditors.*"

Here the distinction between conveyances made with intent to hinder, delay or defraud creditors, and conveyances made with intent to prefer creditors, is clear and manifest. There can be no mistake as to what was meant by the respective terms. In the one case, all conveyances made with intent to hinder, delay or defraud creditors constitute acts of bankruptcy, whether the person making the conveyance was *solvent* or *insolvent* at the time. In the other case, a conveyance with intent to prefer a creditor is not an act of bankruptcy, unless the person making the conveyance is actually insolvent. In the first case it is clear that it was intended to cover conveyances involving actual fraud, and not simply cases involving matters of preference.

It is the same with reference to Section 67-e. The transactions therein denounced are conveyances and incumbrances made or given "with the intent to hinder, delay or defraud creditors." All such conveyances and incumbrances within four months of bankruptcy, whether

made or given by a person at the time insolvent or not. No question of solvency is involved—simply, was the conveyance or incumbrance intended to actually cheat and defraud creditors? If so, it is null and void. It is clear that if it was intended by Section 67-e to cover cases of simple preference, they would have been restricted to those in which the person giving the preference was at the time insolvent.

As stated above, the words "with intent to hinder, delay or defraud creditors" have a well understood meaning. They do not cover cases in which conveyances are made with the honest purpose on the part of the debtor, though insolvent, of paying or securing a debt. The execution of a mortgage may hinder and delay other creditors in the payment of their claims, but that is not what is meant. The conveyance denounced is one specially *intended* by the maker to have the effect of hindering and delaying creditors in the satisfaction of their claims, a contrivance for the purpose of protecting his property. It does not cover a case where a mortgage is given for the purpose of securing an honest debt, although incidentally the result may be to delay or hinder other creditors. The *intent* to hinder or delay must be actual, not presumed as a consequence of acts.

As aptly phrased by the District Court in this case:

> "Section 67-e has reference to conveyances and transfers involving moral turpitude and which are fraudulent in fact."
>
> "A mortgage which is executed not alone to secure an indebtedness to the mortgagee, but to protect the property of the mortgagor, and to hinder and delay his creditors. This fact being known at the time

by the mortgagee, is fraudulent as to creditors. It is not necessarily fraudulent because its *effect* is to hinder and delay creditors; it must be shown that the mortgage was a fraudulent *contrivance for that purpose,* and that the mortgagor was privy to the fraudulent design. A debtor has undoubted right to secure his creditor by mortgage, and notwithstanding the ultimate effect of this may be to delay other creditors, it will be valid if made in good faith solely for security."

Jones on Chattel Mortgages, Sec. 334.

In a number of cases the Courts have found occasion to construe the words, "intent to hinder, delay or defraud creditors," as used in the Bankruptcy Act, and in each instance it has been held that the words were used in their ordinary meaning as known to the law.

In re Eggert, 43 C. C. A., 1, 102, Fed. 735 (Seventh Circuit.)

Jacobs vs. Van Sickle, 61 C. C. A., 598, 127 Fed. 62 (Third Circuit.)

Lansing vs. Ryerson, 63 C. C. A., 253, 128 Fed., 701 (Sixth Circuit.)

Githerns vs. Shiffler, 112 Fed., 505.

Hark vs. Allen Co., 146 Fed., 665 (Third Circuit.)

Congleton vs. Schreifer (N. J.), 54 Atl., 144.

In re Virginia, etc., Co., 139 Fed., 209.

"A mortgagee is entitled to property of value fully sufficient to cover his demand under any and all contingencies that may be expected or reasonably apprehended, but the debtor, cannot under the pretense of securing a debt, convey much more than is necessary for that purpose, and really with the intent to secure the use to himself and baffle his creditors. Hence the question is always one of intention."

Bump on Fraudulent Conveyances, page 45.

"There is a distinction to be observed between the effect of a transfer by a debtor in failing circumstances, made to pay one or more of his debts, and that intent to hinder, delay or defraud his other creditors, against which the statute is aimed. The effect of the preference may be to delay them or even to prevent them from obtaining payment at all, but if the motive is to pay the preferred debt, the transaction is not invalidated."

Id., page 184.

"A transfer, however, may be fraudulent, although it is made in consideration of an honest debt, for an honest claim may be used as a cover to a covinous transaction. The distinction is between a transfer made solely by way of preference of one creditor over others, and a similar transfer made with a design to secure some benefit or advantage therefrom to the debtor, or to delay creditors in the collections of their debts."

Id., page 189.

"The rule is well established that a conveyance of the whole of a trader's property, or of the whole with a colorable exception made to a creditor, as a security for a pre-existing debt, is fraudulent and void, not only because he thereby deprives himself of the power of carrying on his trade, and withdraws his effects from the reach of his other creditors, but because such a conveyance must either be fraudulently kept secret, or produce an immediate absolute bankruptcy." (Citing cases.)

Rison vs. Knapp, Fed. Cas. No. 11, 861, (Caldwell J.)

"But, it is said the directors, being unable to pay both, had the right to choose between them. We do not deny that a debtor has a legal right to prefer one

creditor over another, when the transaction is bona fide; but this is, in no just sense, a case of preference between creditors. If the law permits the debtor,

Summerville vs. Co., 142 Cal., 529, 76 Pal., 243.

in failing circumstances, to make choice of the persons he will pay, it denies him the right in doing it, to contrive that the unpreferred creditor shall never be paid. In other words, the law condemns any plan in the disposition of property which necessarily accomplishes a fraudulent result."

Drury vs. Cross, 7 Wall, 299, 303.

"But where a person, being lawfully indebted to several creditors, makes a mortgage or other conveyance to one for the open and avowed purpose of preferring him, then in the absence of a law of the forum prohibiting preferences, such mortgage or conveyance is valid, though it may operate to bar other creditors from obtaining satisfaction of their debts. A mortgage which may have the effect of hindering other creditors is not necessarily unlawful, though a mortgage given to defraud them is always so." (Citing cases.)

Davis vs. Swartz, 155 U. S., 631, 639.

"Not only must there be an actual intent, but that intent must be to hinder, delay or defraud creditors. An intent to hinder or delay creditors involves a purpose wrongfully or unjustifiably to prevent, obstruct, embarrass or postpone them in the collection or enforcement of their claims."

Counsel for the trustee says upon page 32:

"Section 67-e can no more be disregarded than Section 67-f."

Certainly not, but the case at bar does not fit either subdivision. By the terms of Section 67-e certain kinds of

voluntary liens, namely, liens given within four months of bankruptcy *with the intent* and *purpose* to *hinder, delay* or *defraud creditors* and also liens given within four months of bankruptcy by an insolvent, *which are void under the laws of the state in which the property is situated* are declared void, while by the terms of Section 67-f *all* involuntary or judicial liens obtained against an insolvent person within four months of bankruptcy are declared void. In the present case both these subdivisions must be disregarded because neither is applicable.

THERE IS NO PRESUMPTION THAT A MORTGAGE BY AN INSOLVENT IS GIVEN WITH THE INTENT AND PURPOSE TO HINDER, DELAY OR DEFRAUD CREDITORS.

Counsel for trustee on page 11 of his argument attempts to sustain the proposition that the intent and purpose to hinder, delay or defraud creditors must be presumed from the giving of the mortgage.

This is so conclusively answered by Circuit Judge Sanborn in the opinion as found on page 947 of Vol. 152, Fed. Rep., where this case is reported, that further elaboration seems unnecessary and purposeless.

He says:

> "But the word 'transfer' in Section 60-a, both by the express terms of the bankruptcy law and by authoritative decision includes 'the sale and every other and different mode of disposing of, or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security.' Section 1, par. 25; *Pirie vs. Chicago Title & Trust Co.*, 182 U. S., 538, 544, 21 Sup. Ct., 906, 45 L. Ed., 1171; *In re Ed. W. Wright, Lumber Co.*,

(D. C.) 114 Fed., 1011, 1013. A mortgage is a security and a transfer, and subject to the provisions of Section 60-a and Section 60-b. Such a mortgage or transfer as constitutes a preference under Section 60-a is not voidable under Section 60-b by the plain words of that section, and by its adjudicated construction unless the creditor who receives it, or is benefited by it, or his agent, *has a reasonable cause to believe that it was intended thereby to give a preference. Pirie vs. Chicago Title & Trust Co.*, 182 U. S., 438, 446, 21 Sup. Ct., 906, 45 L. Ed., 1171; *McNair vs. McIntyre*, 113 Fed., 113, 114, 51 C. C. A., 89, 90; *Hussey vs. Richardson-Roberts Dry Goods Co.* (C. C. A.), 148 Fed., 598, 599; *Pittsburgh Plate Glass Co. vs. Edwards* (C. C. A.), 148 Fed., 377.

"And finally, mortgages or transfers, to secure pre-existing debts made within four months of the filing of a petition in bankruptcy, are legal and valid, unless voidable by reason of some provision of the bankruptcy law, or of some state law, notwithstanding the fact that they create preferences.. They are valid unless avoided; not void unless validated. The provision of Section 67-d, that liens for present considerations given and accepted in good faith shall not be affected by the bankruptcy law, does not strike down or render voidable those given and accepted for past considerations, and Section 67-e, which declares that all transfers made or given by a person adjudged a bankrupt within four months before the filing of the petition, 'with the intent and purpose on his part to hinder, delay or defraud his creditors, or any of them, shall be null and void,' is necessarily limited by the force of its terms to those transfers which are given with that intent only, and it leaves those given and accepted without such an intent unaffected by it and valid. A transfer or mortgage made by a person adjudged a bankrupt to secure a pre-existing

debt within four months of the filing of the petition is not voidable under Section 67-e, unless it was either made with the intent on his part to hinder, delay and defraud his creditors, or some of them, or is held void as against his creditors by the laws of the state, territory or district in which the property is situated. The result is that the mortgage to Arts was properly sustained by the Court below."

REVIEW AND ANALYSIS OF AUTHORITIES.

In *Brandenburg on Bankruptcy,* Section 60 is construed to have reference to preferences by way of liens as well as conveyances in satisfaction of debts, and the rule is announced that to make a preference voidable the creditor must have had reasonable cause to believe such preference was intended.

Brandenburg on Bankruptcy (3d Ed.), Sec. 962.

The same doctrine is announced in

Loveland on Bankruptcy (2d Ed.), Sec. 159-160.

Section 60 has been construed by this Court in the following language:

"But if the person receiving the preference did not have cause to believe it was intended, what then? It follows that the condition being absent, its effect will be absent. In other words, he may keep the property transferred to him."

Pirie vs. Co., 182 U. S., 438, 446.

And in the same case, referring to the meaning of the word "transfer," as used in Section 60, it is said:

"It seems necessarily to mean that a transfer of property included the giving or conveying anything of value,—anything which has debt paying or *debt securing* power."

Id., page 443.

It is manifest from an examination of the opinions in the late case of *Keppel vs. Bank*, 197 U. S., 356, that it did not appear to this Court, from an examination of the Bankruptcy Law, that all preferential mortgages given by an insolvent within four months of bankruptcy to secure a pre-existing debt were necessarily voidable. In that case the bankrupt gave to the bank a mortgage on property in Ohio to secure a pre-existing indebtedness, by which the bank obtained a preference and within four months adjudication in bankruptcy was had. Under counsel's contention with reference to the law a mortgage taken under such circumstances would be voidable anywhere, and irrespective of any law of the state wherein the property mortgaged was situated. But, as shown by the opinion of the Court rendered by Mr. Justice White and the dissenting opinion of Mr. Justice Day, the mortgage was held void, solely because of the provisions of the clause of Section 67-e making conveyances declared void by the laws of the state wherein the property mortgaged was situated void under the Bankruptcy Law.

> "It results that the voidable nature of the transaction *alone* arose under Section 67-e * * * invalidating conveyances * * * which are held null and void * * * by the laws of the state * * * in which such property is situate."

Page 360:

> "It is argued on behalf of the creditors that although the mortgage, made a few days prior to the bankruptcy proceedings and when the bankrupt was insolvent, *was void under Section* 6343 *of the Revised Statutes of Ohio, etc.*"

Keppel vs. Banks, 197 U. S., 366.

It may be urged that the question as to whether the mortgage was voidable or not was not in issue in the case, and that it was conceded that it was voidable, but the fact remains that the question of *why* it was voidable was involved in the discussion of the case; that the determination of the questions actually involved made necessary an examination of the whole bankruptcy law and particularly the portions relating to mortgage liens, and that from such examination this Court deduced the conclusion that the mortgage in question was voidable *solely* because of certain provisions of the Ohio law with reference to preferences.

The reasoning of this Court in a recent case strongly supports our contention. That was a case in which a mortgage was held a voidable preference, and this Court in its opinion states the elements necessary to be proved to render the mortgage voidable, in the following language:

> "On the merits of the case we start with the facts established against the bank, that the property of Young, at the time he executed the chattel mortgages and when he executed the deed to the lumber company, at a fair valuation, was insufficient to pay his debts, and that by the execution of those instruments and the transfer of his property affected thereby he intended to give the bank a preference over his other creditors, *and that the bank had reasonable cause to believe that he intended thereby to give it a preference*, and to enable it to obtain a greater percentage of its debt than any other creditor of Young of the same class. These, then, are the prominent facts, and seemingly justified the judgment."
>
> *Eau Claire Nat. Bank vs. Jackman*, 204 U. S., 522, 532.

In a case in the Eighth Circuit, it is said:

"When the mortgages were executed the mortgagor was insolvent, but the bank to whom they were given did not know it and had no reason to believe he had intended to give a preference. One of them was withheld from the record about ten months, and the other about two months. When they were recorded, which was a month before the petition in bankruptcy was filed, the bank knew the mortgagor was insolvent and contemplated a disposition of his property to secure certain of his creditors. It also knew the inevitable effect of the enforcement of the mortgage would be to give it a greater percentage of its claims than other creditors."

Held that the mortgages were voidable by the trustee on account of the knowledge of insolvency by the bank at the time the mortgages were recorded.

"The mortgages of the bank, required by law to be recorded within four months of the filing of the petition in bankruptcy and at a time when the mortgagor was insolvent, the effect thereof being to enable the bank to obtain a greater percentage of its claims than other creditors of the same class, a preference arose under Section 60-a. *Was it voidable under Section* 60-b? In other words, did the bank have reasonable cause to believe that it was intended thereby to gain a preference? The bank knew that the mortgagor was insolvent and that a preference was in fact then created, but in the strict sense it cannot be said that it had reasonable cause to believe that one was then intended. While the situation is somewhat anomalous we believe it is within the spirit of the amended act, and that the *voidable* element is established by the *knowledge of the bank*, when its mortgages were recorded, *that the mortgagor was insolvent and contemplated a disposition of his property.*"

First Nat. Bank vs. Connett, 142 Fed., 33.

The holding of the Court of Appeals for the Seventh Circuit in a recent case has been the same. In that case the validity of a chattel mortgage given within four months of bankruptcy was involved. The Court held the mortgage valid on two grounds:

(1) Because the bank was solvent at the time of giving the mortgage. (2) Because even if insolvent at said time, there was no proof that the mortgagee had reasonable cause to believe a preference was intended by the giving of the mortgage.

J. W. Butler Paper Co. vs. Goembel, 143 Fed., 295.

This ruling was in accord with decisions in prior cases by the Court. We instance the leading case of *In re Eggert*. In that case the debtor, while insolvent, gave to the creditor an order on a third party for the payment of money, and the order was paid, resulting in the creditor being preferred. The creditor did not have reasonable cause to believe a preference was intended. Held not a voidable preference.

In re Eggbert, 43 C. C. A., 1, 102 Fed., 735.

The Court of Appeals for the Sixth Circuit has ruled in the same way.

In re First Nat. Bank, 67 C. C. A., 536, 135 Fed., 62.

A recent case decided by Judge Rogers of the Western District of Arkansas is in point. In that case the validity of a mortgage given to secure a pre-existing debt was involved which the trustee resisted on two grounds, claiming

(1) That the mortgage was void because executed by an insolvent within four months of bankruptcy, and a preference.

(2) That it was given for the purpose of hindering, delaying and defrauding creditors (Section 67-e) and a preference.

The Court held that neither of these defenses was good; that more had to be shown than the mere insolvency of the debtor, and that Section 67-e had no application, and that the decision of the case turned on the question whether the creditor had "reasonable" cause to believe that it was intended thereby (by the giving of the mortgage) to give a preference. Under the facts, it was held that the creditor actually did have such belief.

In re Virginia Hardwood Mfg. Co., 139 Fed., 209.

In a case by Judge Humphrey of the Southern District of Illinois, it appeared that the debtor, while insolvent, assigned to the creditor a fire insurance policy, and that this constituted a preference. On examination of the facts it was held that the creditor had reasonable cause to believe a preference was intended by the assignment of the policy, and the assignment held null and void.

In re Graham, 110 Fed., 133.

The Supreme Court of Iowa, in a number of cases similar to the case at bar involving the validity of mortgages under the Bankruptcy Law, has decided that before the mortgage can be held invalid there must be proof that the mortgagee had reasonable cause to believe that a preference was intended.

> "Knowledge or a reasonable cause to believe that a preference is intended involves, therefore, knowledge or a reasonable cause to believe that insolvency exists as a matter of fact." (Citing cases.)
>
> *Des Moines Sav. Bank vs. Co.*, 123 Iowa, 432, 99 N. W. R., 121.

"In *Boudinot vs. Hamann*, 117 Iowa, 22, we held, following *Barbour vs. Pirest*, 103 U. S., 293, that this section (60-b) applies only when the creditor knows or has reasonable cause to believe the debtor was insolvent."

Deland vs. Bank, 119 Iowa, 368, 370.
Cullinane vs. Bank, 123 Iowa, 340, 98 N. W. R., 887.
Murphy vs. Murphy, 126 Iowa, 57, 101 N. W. R., 486.
Bardes vs. Bank, 122 Iowa, 443.

The Supreme Court of Nebraska, in a number of cases, has announced the same rule:

Hadley vs. Rayman, 94 N. W. R., 822.
Farmers' Bank vs. Wilson, 95 N. W. R., 609.
Johnson vs. Anderson, 97 N. W. R., 339.

The following recent cases involving validity of mortgages are directly in point:

In re Nassau, 140 Fed., 912 (E. D. Pennsylvania, J. B. McPherson, D. J.)
Summerville vs. Co., 142 Cal., 529, 76 Pac., 243.
Whitson vs. Bank, 105 Mo. App., 605, 80 S. W., 327.
Crawford vs. Rumpf, 205 Pa., 226, 54 A., 782.
Empire, etc., Co. vs. Fisher Co. (N. J. Ch.), 57 A., 502.
Laundy vs. Bank, 66 Kan., 759, 71 Pac., 259.
Bunnel vs. Bronson (Conn.), 63 A., 396.

"It seems to have been considered by Congress, and so far led it to depart from the scheme of absolute equality of distribution as to protect the diligent creditor from being compelled to surrender any property or contractual lien which he has innocently received in payment or as security; for, under Sec-

tion 60-b, to compel its return he must be shown to have had reasonable cause to believe that it was intended as a preference."

Strobel vs. Knost, 99 Fed., 409.

"There are no facts shown in the present case from which it can be found that Wyman, Partridge & Co., at the time such payments were made, had reasonable cause to believe that Mrs. Goodhile was insolvent or intended a preference by the payments she made to it."

In re Goodhile, 130 Fed., 474.
Crandall vs. Coats, 133 Fed., 965.

In a recent case in the Fourth Circuit, Brawley, District Judge, says with reference to certain mortgages:

"All of these mortgages would have been void under the Bankrupt Act prior to the amendment of February 5th, 1903, in that they were executed within four months before the filing of the petition, when the bankrupt was insolvent, and by them the creditors named obtained a greater per cent. of their debts than any other creditors of the same class. The main object of the Bankrupt Act and one of its beneficial results was an equal distribution among his creditors of the estate of the bankrupt. The effect of the amendment referred to is in most cases to practically defeat this beneficial intent, *for it becomes necessary now* to prove that the party receiving the preference had reasonable cause to believe that it was intended thereby to give a preference."

In re Tindal, 155 Fed., 456. (Although the Court is evidently mistaken as to the amendment of February 5th, 1903, it arrives at the same interpretation of the law as the Courts of other districts.

the case *In re McLoon*, Hall, District Judge, says in the opinion:

> "Did the respondent execute the mortgage to her son, Albert C. McLoon, with intent to hinder, delay and defraud her creditors as alleged in the first paragraph of the petition?"

This allegation is drawn under Section 3 (1) of the Bankrupt Act. (Act July 1, 1898 c. 541, 30 State. 546 U. S. Comp. St., 1901, page 3422), which provides:

> "Acts of bankruptcy by a person shall consist of his having conveyed, transferred, concealed or removed, or permitted to be concealed or removed any part of his property with intent to hinder, delay or defraud his creditors or any of them."

The intention which is brought into question by this act must be an actual intention. In *Lansing Boiler Works vs. Ryerson*, 128 Fed., 701, in speaking for the Circuit Court of Appeals for the Sixth Circuit, Judge Stevens said:

> "The test of the conveyances by Subsection 1 of Section 3 is that of the bona fides of the transfer, for it is the well settled law that a conveyance made in good faith, whether for an antecedent or present consideration is not forbidden by such statutes, nothwithstanding the effect may be that it hinders or delays creditors by removing from their reach assets of the debtor."
>
> *In re McLoon*, 162 Fed., 575.

Where an insolvent transferred property, and within four months thereafter was adjudicated a bankrupt, such transfer was not voidable as a preference under the Bankrupt Act, unless at the time of the transfer the transferee

had reasonable cause to believe that it was intended thereby to give a preference over other creditors.

Cummings vs. Co., 99 S. W. R., 470, 123 Mo. App., 9.

The national bankrupt law does not prohibit all transfers of property by an insolvent, but only those which are in fraud of the act.

Andrews vs. Kellog, 92 Pac., 222.

While a bankrupt's trustee, in order to set aside a transfer as a preference is not required to show that the transferee had actual knowledge that a preference was intended by the transfer, or that the transferor was insolvent, it must be shown that the transferee was in possession of some fact or facts which would have led a reasonable prudent man to inquire and that the result of such an inquiry would have disclosed the transferor's insolvency.

Andrews vs. Kellog, supra.

To render a preferential payment received by a creditor from his debtor within four months prior to the latter's bankruptcy voidable, the bankrupt must not only have been insolvent when the payment was made, but must have intended it as a preference, and if in fact made in the ordinary course of business, without thought of injuring other creditors and in the belief in his ability to pay them all, the creditor receiving it cannot be charged with reasonable cause to believe that a preference was intended.

In re First Nat. Bank, 155 Fed., 100.

In order to render a preference voidable under Bankrupt Act, which provides that it shall be voidable if the

creditor receiving it or his agent, "shall have had reasonable cause to believe that it was intended thereby to give a preference," it must appear that the creditor had a reasonable cause to believe that the debtor was then insolvent within the meaning of such terms as defined by the act.

In re Pfaffinger, 154 Fed., 523.

Under Bankrupt Act providing that if a bankrupt shall have given a preference and the person receiving it shall have had reasonable cause to believe that it was intended to give a preference, it shall be voidable by the trustee, and he may recover the property or its value, it is not sufficient that the bankrupt may have made an assignment by way of preference, nor that his insolvency and intention to prefer might have been ascertained by the exercise of due diligence on the part of the preferred creditor, but the creditor at the time of receiving the preference must have had knowledge of such facts as afforded a reasonable cause to believe that the assignment was intended to give a preference.

Ark. Nat. Bank vs. Sparks, 103 S. W., 626.

Knowledge that bankrupt failed to meet his obligations promptly is not as a matter of law sufficient to put a creditor receiving a preference upon inquiry, or to give it reasonable cause to believe that a preference is being given.

Idem.

Under Bankrupt Act providing that all conveyances or transfers of his property made by a person adjudged a bankrupt under the provisions of this act within four months prior to the filing of the petition, with the intent

to hinder or delay his creditors, shall be null and void as against the creditors, the bare transfer of property by an insolvent is not of itself sufficient to warrant the setting aside thereof, but is a circumstance to be considered with all the other facts in evidence.

Webb's Trustee vs. Co., 56 S. E., 581.

Under Bankruptcy Act, providing that a preference by a bankrupt is voidable by the trustee when received by a person having reasonable cause to believe that it was intended to give a preference, and providing that transfers by a bankrupt within four months prior to the filing of the petition, with intent to defraud creditors shall be void except as to purchasers in good faith, in order to constitute a fraudulent preference it must be an advantage actually given to a creditor over others, with knowledge of his situation and the intent to accomplish this end.

Bacon vs. Bank, 40 So., 413.

Where at the time of the giving of an alleged preference by a bankrupt, defendant's agent was informed that, in case of a sale of the bankrupt's goods at their then estimated worth, the bankrupt's ability to pay its creditors in full would depend on its ability to collect its then outstanding accounts of an undisclosed amount, such information was insufficient of itself to charge defendant with knowledge that a preference was intended by the completion of the transaction in question.

Off vs. Hakes, 142 Fed., 364.

Neither the fact that a debtor's accounts are past due, nor the fact alone of his financial embarrassment, is sufficient to impeach the good faith of a creditor in taking security so as to render the same voidable as a preference,

where there were circumstances which tended to explain such embarrassment upon grounds other than insolvency.

Butler Paper Co. vs. Goembel, 143 Fed., 295.

Where payments were made by bankrupts to their creditors within four months prior to the institution of bankruptcy proceedings, and the creditors had no reasonable cause to believe that it was intended thereby to give a preference, the payments were not voidable by the trustee, nor was the creditor bound to surrender the same as a condition of his right to prove his debt in the bankruptcy proceedings.

In re Maher, 144 Fed., 503.

A payment made by an insolvent to a creditor within four months prior to the debtor's bankruptcy may be recovered by his trustee as a voidable preference, if the creditor had reasonable cause to believe a preference was intended, irrespective of the debtor's actual intention; and such reasonable cause exists if the creditor had knowledge of the insolvency or of facts which reasonably charge him with such knowledge.

Parker vs. Black, 143 Fed., 560.

Where the agent of a creditor, when taking mortgages to secure the indebtedness to his principal within four months prior to the debtor's bankruptcy, had a knowledge of facts which should have put him on inquiry as to the debtor's solvency, he and his principal are legally chargeable with knowledge of such facts as the inquiry would have disclosed.

In re Nasseau, 140 Fed., 912.

Where a creditor of a bankrupt at the time he received a preference had reasonable cause to believe that

a preference was intended, and should have known from the circumstances surrounding the bankrupt's condition that he was insolvent, the creditor's actual belief was immaterial on the issue of the voidability of the preference.

In re Hines, 144 Fed., 543.

In order to make a preference by mortgage unlawful, it is necessary that the preference shall have been made with the intention on the part of the bankrupt to prefer the person to whom the mortgage is given, and that the mortgagee at the time he receives the mortgage shall have reasonable cause to believe that a preference to him was intended, and that the debtor is insolvent.

Summerville vs. Co., 142 Cal., 529, 76 Pac., 243.

"The bank must have had reasonable cause to believe not only that insolvency existed as a fact, but that a preference was intended; and this must be made to appear before the mortgage can be avoided at the suit of the trustee."

Cullum vs. Bank, 123 Iowa, 340, 98 N. W., 887.

Held, that the giving of a mortgage by a debtor to one of his creditors on all his property did not amount to a preference within the Bankruptcy Act, which would entitle the trustee to avoid it, unless the mortgagee had reasonable cause to believe that the mortgagor was insolvent.

Des Moines Bank vs. Co., 123 Iowa, 432, 99 N. W., 121.

There was a finding that the bankrupt, while insolvent, transferred certain accounts to a creditor as security with intent to prefer him. This was within four months of bankruptcy. Held not sufficient to show that the cred-

itor had reasonable cause to believe that such security was intended as a preference, and security was sustained.

Laundy vs. Bank, 66 Kas., 759.

Where in an action to cancel a mortgage as an illegal preference under the Bankruptcy Act, it appeared that the debtor regarded himself as able to pay his debts; that a receiver, after an examination, found him solvent, and that the creditor examined the books of the debtor's business, which showed good profit * * * the creditor cannot reasonably be charged with knowledge that the debtor was insolvent, and that a preference was intended when the mortgage was given.

Mortgage sustained.

Stratton vs. Lawson, 27 Wash., 310, 67, Pac., 562.

To the same effect attention is called to the following cases:

Dry Goods Co. vs. Frenkel, 86 S. W., 949.
Bacon vs. Bank (Ala), 40 So., 413.
Dunlop vs. Thomas, 28 Wash., 521, 68 Pac., 909.
Suffel vs. Bank, 127 Wis., 208, 106 N. W., 837.
Harmon vs. Walker, 131 Mich., 540, 91 N. W., 1025.
Hawes vs. Bank, 124 Ga., 567, 52 S. E., 922.
Bank vs. Wilkerson (Ind.), 72 N. E., 247.
Bardes vs. Bank, 122 Iowa, 443, 98 N. W., 284.
Harmon vs. Feldheim, 131 Mich., 470, 91 N. W., 744.
Thompson vs. Bank, 84 Miss., 54, 36 So., 65.
Lampkin vs. Bank, 98 Mo. App., 239, 71 S. W., 715.
Cummings vs. Co., 99 S. W., 470.
Sirrine vs. Co., 64 S. C., 457, 42 S. E., 432.
Townes vs. Alexander, 69 S. C., 23, 48 S. E., 214.
Harrus vs. Bank, 110 Tenn., 239, 75 S. W., 1053.

CASE OF GRANT VS. BANK.

There is a striking similarity between the facts in the case at bar and those in the leading case of *Grant vs. Bank*, under the Bankruptcy Act of 1867, and we desire to particularly call attention to that case. Wherever points of dissimilarity exist, it will be found they are in favor of the mortgagee in the present case.

The Grant case involved the validity of a mortgage given by the bankrupt, Miller, to a bank, and the facts, as stated by the Court, were as follows:

The mortgage was given to the bank about two months before bankruptcy proceedings were instituted. Miller owed the bank $4,000 on a note which had been twice renewed, and $2,200 on an overdraft. He borrowed $300 more, and gave the bank a mortgage for $6,500. Miller was addicted to some incorrect habits, was somewhat reckless in his manner of doing business, and seemed pressed for money. He had been for years fattening cattle and borrowing money for such purpose, also overdrawing his account. When the mortgage was taken his manner of doing business was the same as it had been always. He was insolvent at the time, but was largely indebted in another county, and the bank had no knowledge of that indebtedness. After giving the mortgage the bank allowed him to overdraw his account. Under these facts the mortgage was held good.

To compare the facts: In each case the mortgage was given to a bank by a man who had been for years fattening cattle and borrowing money for that purpose. In the Grant case Miller owed the bank $4,000 on a note twice renewed, and $2,200 on an overdraft; in the present case Armstrong owed the bank some ninety thousand dollars

on notes which had been renewed, and $2,039 on an overdraft. In the Grant case the ovedraft was included in the mortgage; in the present case it was not. In the Grant case the bankrupt was addicted to incorrect habits and seemed pressed for money; in the present case the bankrupt's habits were correct, and he could get all the money he wanted. In both cases the bankrupt was permitted to overdraw his account at the bank quite freely. In both cases when the mortgage was given the bankrupt's manner of doing business remained the same and the relations between bank and bankrupt continued precisely as before. In both cases the mortgagor was insolvent, but a large part of the indebtedness was in other counties or states and unknown to the bank.

In the case at bar many other facts favorable to the mortgagee's claim appeared. Armstrong was reputed one of the wealthiest farmers in the county, owning 2,440 acres of good Iowa farm land worth $75.00 per acre, practically unencumbered, besides much other property, and generally held to be worth a quarter of a million dollars.

The news of his failure and bankruptcy came as a great shock and surprise to the people of Carroll County, where he lived, and was one of the greatest sensations in that county for years. The circumstances under which the mortgage was taken were explained so as to preclude the idea of the bank even suspecting Armstrong's insolvency. Arts had allowed Armstrong practically unlimited credit. There was no uneasiness or alarm on the part of Arts or any of his representatives; no haste shown in procuring the mortgage; everything was done in the natural and ordinary course of business. These and many more facts appear in the record, all favorable to Art's

claim. Similar in many respects to the facts in the Grant case, the facts in the case at bar are much stronger in favor of the mortgage, and the Supreme Court having sustained the mortgage in the Grant case, certainly the present mortgage should be sustained. We quote a few pertinent extracts from the Grant case:

> "It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for a debt."
>
> "He may be unwilling to trust him further; he may feel anxious about his claim, and have a strong desire to secure it,—and yet such belief as the act requires may be wanting. Obtaining additional security, or receiving payment of a debt, under such circumstances, is not prohibited by the law. Receiving payment is to put in the same category in the section referred to, as receiving security."
>
> "After obtaining the security in question, they still allowed him to check upon them for considerable amounts in advance of his deposits. They were alarmed, but they still granted him temporary accommodations. Had they actually supposed him to be insolvent, would they have done this?
>
> *Grant vs. Bank*, 97 U. S., 80.

In a subsequent case, the Supreme Court, in an opinion rendered by Justice Miller, approved and followed Grant case:

> "Up to the time of the failure of the First National Bank of Mansfield, September 26, 1873, a very few persons had any doubt of Colby's entire solvency."
>
> In *Grant vs. National Bank*, this Court said:
>
> "The act, *very wisely*, as we think, instead of making a payment or a security void for a mere sus-

picion of the debtor's insolvency, requires for that purpose, that his creditor should have some reasonable cause to believe him insolvent."

Barbour vs. Priest, 103 U. S., 293.

"That case (*Grant vs. Bank*), establishes the doctrine that a creditor dealing with a debtor, whom he may suspect to be in failing circumstances, but of which he has no sufficient evidence, may receive payment or security without violating the Bankrupt Law. He may be unwilling to trust him further; he may feel anxious about his claim and have a strong desire to secure it, yet such belief as the Act requires may be wanting. Obtaining additional security or receiving payment of a debt under such circumstances, is not prohibited by law."

"In the case before us the testimony of Krieger himself, as the one who best knows the strength of the suspicion, if any, on which he acted, and what evidence was before him, must chiefly control. We have examined his deposition very carefully. We think it bears the impress of candor, and it negatives the idea that he had reasonable ground to believe Melter insolvent, or that he did actually believe it."

Stucky vs. Bank, 108 U. S., 74.

AS TO THE CASES RELIED ON BY THE TRUSTEE.

Counsel for the trustee, however, rely on the following cases to which we will briefly refer.

These cases were for the most part decided by Circuit Court of Appeals of the Fourth Circuit where the law will be found in a decidedly unsettled condition.

The case of *In re Sanderlin*, 109 Fed., 857, cited by counsel for the trustee, was reversed by the Court of Appeals for the Fourth Circuit. *McNair vs. McIntyre*, 113

Fed., 113. The validity of a chattel mortgage was involved, and it was found as a matter of fact that neither mortgagor or mortgagee had any knowledge of insolvency. Under this state of facts, the Court of Appeals, following *Pirie vs. Co.*, 182 U. S., 446, reversed the action of the lower Court and held the mortgage valid.

> *McNair vs. McIntyre*, 51 C. C. A., 89, 113 Fed., 113.

Another case is that of *In re Jones*, 118 Fed., 673, affirmed under the name of *Pollock vs. Jones*, 124 Fed., 163. This was a case also involving the validity of a chattel mortgage, and it was held invalid on three grounds:

(1) Under the state law, because purporting to have been given by a partnership, and signed by one partner only and never ratified by the other.

(2) Under the state law because constituting an assignment with preference.

(3) Under the Bankruptcy Law, because both the debtor and creditor, under the facts must have known preference was intended.

The Court said:

> "In the case at bar, when Pollock received this chattel mortgage covering all the property of the mortgagee, and when Duff gave the mortgage, practically clothing Pollock with a legal title to all the property of the firm, it is impossible to say that the one did not know that he got a preference, and that the other was unaware that he gave a preference.
>
> "It is clear from this, and in fact it must be clear to any one from reading the facts in the case, that the mortgagee, Pollock, knew that a preference was intended. It is vain for one to say, who has received

a chattel mortgage on the whole of a trader's stock, that he did not know he was getting a preference thereby. As stated by Judge Caldwell in *Rison vs. Knapp, supra*, 'such a conveyance must either be fraudulently kept secret or produce an immediate absolute bankruptcy.' One taking such a mortgage will not be permitted to deny that he knew the mortgagor was insolvent, at least such a denial will not receive any weight in a Court, as it is a matter of common knowledge that a trader will not give a mortgage on all his stock unless he is hopelessly insolvent and ready to go out of business."

Pollock vs. Jones, 61 C. C. A., 555, 124 Fed., 163.

Following this is the case of *Farmer's Bank vs. Carr*. The validity of a chattel mortgage was involved in this case also. The mortgage was given to a bank, and it was held invalid because the president of the bank either knew or should have known of the insolvency of the mortgagor.

"It is impossible to escape the conclusion, after reading that testimony, that the bankrupts certainly knew their precarious condition as to insolvency; and that if the president of the Edgefield Bank did not know it, he had every resaon to do so if he used his opportunities, and that certainly other officers of the bank knew."

Farmers Bank vs. Carr, 62 C. C. A., 446, 127 Fed., 690.

There are two other cases in that Court involving the question under discussion, in both of which the opinions were written by Judge Waddill. They are *City National Bank vs. Bruce*, and *Morgan vs. Bank*.

In the former case it appeared that a mortgage was given to the bank to secure a pre-existing indebtedness and a present loan; that seventeen days thereafter the

mortgage was recorded, and four days after that the mortgagor was thrown into involuntary bankruptcy. The statement of facts is meager, and does not show whether the mortgagor was solvent at the time of giving the mortgage, nor is there any finding as to the bank's knowledge of insolvency or that a preference was intended, but it is stated that the referee and the Court below

> "Found nothing in the evidence to warrant the conclusion that the mortgage was not given and accepted in good faith or that it was made in contemplation or in fraud of the Bankruptcy Act."

The mortgage was held valid merely as to the present loan.

It is difficult to follow the line of reasoning in the opinion, but it seems that the case was decided purely on Section 67-d of the Bankruptcy Act, and that the other provisions of the law were ignored. The findings seemed to have been based entirely on said Section 67-d, and there is no discussion of any other provisions of the law. The decision cannot be reconciled with the other decisions of the same Court in the cases above cited, which were subsequently rendered.

> *City National Bank vs. Bruce*, 48 C. C. A., 236, 109 Fed., 69.

From an examination of the cases we have been able to find that this case has been cited only five times as authority in the Federal Courts. Once by the same Court in an opinion by the same judge in the case of *Morgan vs. Bank*, referred to below. Again by the same Court, in an opinion by District Judge Brawley, where the reference, however, is merely incidental, and it was held, under the facts that the Bruce case did not apply. *Crim vs. Wood-*

ford, 136 Fed., 34, 41, 68 C. C. A., 584. Once by the District Court of the Eastern District of Virginia, in the same circuit also in an opinion by Judge Waddill, in which, however, the citation is merely made as authority to show that a loan for a present consideration is valid. *In re Dismal Swamp Contracting Co.*, 135 Fed., 415, 418. Once by the District Court of Maryland, in the same circuit, in an opinion by District Judge Morris, in reference to the same matter of a present loan. *In re Durham*, 114 Fed., 750, 754. Once by the District Court of Massachusetts, in an opinion by District Judge Lowell, *In re Belding*, 116 Fed., 1016, 1017. This case is discussed further on in this brief, and it will be seen that at the time the creditor bank appropriated the money involved it clearly knew it was being preferred.

In the other case referred to, *Morgan vs. Bank*, it appeared that a mortgage was given to secure a pre-existing indebtedness. The Court found there was no actual fraud in the transaction, but further found that the mortgage "was intended to create a preference, and the securities accepted for that purpose." Of course, if the securities were accepted for the purpose of creating a preference, the mortgagee must have known that "it was intended thereby to give a preference," and hence the mortgage was voidable. A careful examination of the opinion will show that this is really all that was decided, and this is quite in line with our contention.

Morgan vs. Bank, 145 Fed., 466.

On page 44 of his brief, counsel for the trustee have cited a number of cases as sustaining his contentions, but on examination it will be found that the cases are not in point:

In re Sawyer, 130 Fed., 384, involved a mortgage given to secure money loaned at the time, and the point decided was on a matter of interest and a bonus for the loan.

In re Cobb, 96 Fed., 821: In this case the facts clearly show that the mortgagee had knowledge that a preference was intended in giving the mortgage which secured both a present loan and a pre-existing indebtedness.

In re Belding, 116 Fed., 1016: In this case it appeared that the debtor owed the bank $6,000, secured by collateral and $4,000 unsecured. Subsequent to bankruptcy the collateral was sold, realizing over $6,000, and the bank took the surplus and applied it to the payment of the $4,000. The Court held this could not be done, and this was clearly correct. The bank, at the time it received the proceeds from the collateral, knew of the insolvency, and it had no right to prefer itself by appropriating the money in its hands to the payment of the $4,000 debt.

In re Wolf, 98 Fed., 84: In this case the statement of facts is meager, but it was found that the mortgage security, insofar as it applied to the pre-existing indebtedness, was a preference and taken under the circumstances rendering it invalid, and that it was intended to create a preference. The circumstances under which the security was taken are not set out, but it is manifest that the case was decided under Section 60-b, and that knowledge of the intention to create a preference was imputed to the mortgagee. A significant fact alleged is that the mortgagee would not make the present loan unless secured for the past indebtedness.

In re Durham, 114 Fed., 750: In this case mortgages were given to a bank to secure a pre-existing debt of $5,000

and a number of present loans. It seems that the bank made no attempt to establish the validity of the mortgage covering the $5,000 existing indebtedness, conceding that as to that it knew it was getting a preference, and exerting its efforts to establish the mortgages securing the present loans, and the opinion of the Court was directed entirely to the question whether those mortgages were valid.

Davis vs. Turner, 120 Fed., 605: This was a case in which a mortgage was taken as security for a present loan, and this was held to be strictly within the provisions of Section 67-d, and the mortgage held good.

In re Pease, 129 Fed., 446: In this case money was borrowed by an insolvent for the purpose of preferring certain creditors, and a mortgage was given as security therefor. The mortgagee knew the purpose of the loan. Held a fraud on the act and therefore the mortgage was void.

In re Gutwillig, 92 Fed., 337: In this case a voluntary general assignment for the benefit of creditors was held void on bankruptcy proceedings being commenced within four months thereafter.

None of these cases nor any others in the book sustain the position counsel has been obliged to take in the case at bar.

QUESTION OF INTEREST.

Counsel for appellant has made some slight reference to the matter of interest, at the end of his brief. However, he has not assigned as error any action of the Court of Appeals with reference thereto (Transcript, p. 29), and accordingly has waived any alleged error with reference thereto. In addition the record does not show what action the Court of Appeals took with reference to the matter of

interest. The decree merely recites that the decree of the District Court is affirmed with costs, "except as modified relative to the question of interest upon the petition for review, *In re William Arts*, Petitioner, No. 74 Original, which was submitted and decided herewith." (Transcript, p. 25.) The other case, No. 74 Original, is not before this Court, and this Court cannot tell what action the Court of Appeals took with reference to the matter of interest, and hence cannot review its judgment. It is true that in the alleged findings of fact it is said that there is due the appellee on the notes secured by the mortgage, with interest to March 1, 1906, the sum of $109,107.56, and it is found, as a conclusion of law, that Arts should recover said amount out of the proceeds of the mortgaged property, but of course the action of the Court as to findings of fact and conclusions of law is not reviewable in this Court. The Court's action is found in the decree, and that decree does not show that this alleged interest was allowed. In addition, the question of allowance of interest on a preferred claim, and in fact the whole matter of the allowance or disallowance of preferred claims, that is, the decision as to whether they should be preferred or not, is committed to the District Courts and Circuit Courts of Appeals, and it is not contemplated that their action thereon should be reviewed by this Court.

However, while we contend that the question is not properly before this Court on the record, if it be conceded from an examination of the findings and opinion of the Court, that interest was allowed, it is manifest that this was proper, and on that point we need do no more than quote the language of Judge Sanborn, who wrote the opinion, as follows:

"By the terms of the note and mortgage the mortgagor agreed to pay interest on his debt until it was paid, and that the mortgaged lands might be sold by the mortgagee, and that their proceeds might be applied to the payment of this debt and interest. The covenant for the sale and the application of the proceeds of these lands to the payment of the debt and interest was valid and binding, and it ran with the land, so that when the latter came to the hands of the trustee it was mortgaged for the payment of the interest as much as for the payment of the principal, and the proceeds of its sale necessarily came to his possession subject to the same charge. Another rule might prevail if the proceeds of the mortgaged property were insufficient to pay the mortgage debt and its interest in full and the mortgagee was seeking to collect an unpaid balance by sharing with other creditors in the distribution of the common property. He might not be entitled, then, to recover from the proceeds of the common property interest upon his debt to any later date than the unsecured creditors would recover interest upon their claims. But the proceeds of these mortgaged lands appear to be ample to pay the principal and interest of the debt to the mortgagee, Arts, and where a trustee sells mortgaged property of the bankrupt's estate free of the mortgage, and the proceeds of the sale are sufficient for that purpose, the mortgagee is entitled to payment of the interest upon his mortgage debt as well as the principal, out of the proceeds in accordance with the terms of the note and mortgage. *Thompson vs. Fairbanks*, 196 U. S., 516, 526, 25 Sup. Ct., 306, 49 L. Ed., 577; *York Mfg. Co. vs. Cassell*, 201 U. S., 344, 352, 26 Sup. Ct., 481, 50 L. Ed., 782; *In re Devore*, Fed. Case No. 3847; *In re J. H. Allison Lumber Co.* (D. C.), 137 Fed., 543, 649."

In conclusion we insist that the mortgage in question was given and received in entire good faith and not in fraud of the Bankruptcy Law, and that it is valid within both the letter and spirit of the law, and we respectfully ask that the judgment of the Court below be affirmed on this appeal by the trustee.

Respectfully submitted,

GEORGE S. WRIGHT,
ROBERT E. O'HANLY,
Attorneys for Appellee.

No. 93.

Supreme Court of the United States

OCTOBER TERM, 1907

Office Supreme Court, U. S.
FILED.
MAR 16 1909
JAMES H. McKENNEY,

JOSIAH CODER,
Trustee of the Estate of Alexander Armstrong, Bankrupt,
Appellant,
vs.
WILLIAM ARTS, *Appellee.*

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR APPELLEE ON JURISDICTION.

GEORGE S. WRIGHT,
ROBERT E. O'HANLY,
Attorneys for William Arts, Appellee.

Supreme Court of the United States

OCTOBER TERM, 1907

No. 324

JOSIAH CODER,
Trustee of the Estate of Alexander Armstrong, Bankrupt,
Appellant,
vs.
WILLIAM ARTS, *Appellee.*

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR APPELLEE ON JURISDICTION.

I.

Examination of the assignment of errors filed in the District Court in this cause shows, as stated by counsel for appellee in their brief heretofore filed herein, that the trustee, on the appeal to the Circuit Court of Appeals, made no claim that the District Court erred in its finding as to the amount of the provable debt due from the estate to Arts, and the appeal was merely from the action of the court holding Arts' mortgage lien valid and giving

him priority in the distribution of the fund arising from the sale of the mortgaged property. This being so, it is clear that no appeal lay under Section 25a, as from a judgment allowing a claim of over $500. In fact, counsel for appellant admits, in his brief on the question of jurisdiction, that appeal was not taken under said Section 25a, nor could it be.

However, counsel claims the right to appeal under the provisions of Section 24a, alleging that this proceeding is a "controversy arising in bankruptcy proceedings," as distinguished from a "bankruptcy proceeding" proper. As against the case of *Hutchinson vs. Otis*, 190 U. S., 522, and the long array of cases in the different Courts of Appeals cited in our original brief (all being cases directly in point and in which the exact point now under discussion was considered), counsel cites and pins his faith to the lone case of *Hewit vs. Berlin Machine Works*, 194 U. S., 296, which he contends is analogous in principle to the case at bar.

However, the controversy in *Hewit vs. Berlin Works* arose in an entirely different manner from the controversy herein. In the instant case Arts filed his claim against the estate, just as any other claimant would, and in connection therewith stated that his claim was a preferred claim, secured by mortgage, as required by the bankruptcy act. This was certainly a bankruptcy proceeding, a step in bankruptcy, a part of the administration of the estate, a matter for which the act specially provided. Arts thus being before the bankruptcy court as a claimant, with a claim which he said was a preferred claim, one secured on certain assets of the estate, it then became the duty of the

court, *as a court of bankruptcy*, to determine whether he had a just claim, and if so, the amount thereof, and also if it should be a preferred claim. This was not a controversy arising in bankruptcy proceedings, but a part of the bankruptcy proceedings themselves, a matter specially delegated to the bankruptcy court.

The controversy in *Hewit vs. Berlin Machine Works* arose on an entirely different state of facts. In that case the Machine Works did not apply to the bankruptcy court as a creditor of the bankrupt at all. It claimed that neither it nor the property in controversy should be involved in the bankruptcy proceedings; that the bankruptcy court, as a court of bankruptcy, engaged in settling up the affairs of the bankrupt, had nothing to do with it (the Machine Works), nor the property.

It filed a petition of intervention and prayed that the property be delivered to it, as being no part of the estate, and that the court of bankruptcy lay no further claim to it in the settlement of the estate. This constituted quite clearly a controversy arising in bankruptcy proceedings, a separate and independent matter, and not a part of the bankruptcy proceedings themselves. Such a case is clearly distinguishable from the case at bar, where the proceedings were carried on in exact conformity with the procedure laid down by the bankruptcy act in connection with the settlement and administration of the estate.

The importance of keeping in mind in this connection the precise way in which a controversy arises is well illustrated by the holding of this court in the Hewit-Berlin case and the case of *First Nat. Bank vs Co.*, 198 U. S., 280.

In both cases there was a controversy between the trustee and an adverse claimant to property, but the controversy arose in different ways in each case.

In the Hewit-Berlin case the claimant filed a petition of intervention specially claiming the property, and this was held to be a controversy arising in bankruptcy proceedings. In *First Nat. Bank vs. Co.*, the trustee applied for an order to sell the property, and the claimant filed special appearance objecting to the jurisdiction of the court over the property and objecting to the sale. This was the point at issue, whether the court had jurisdiction of the property so as to order the sale. The matter of whether a sale should be made was a matter involving purely and simply the administration of the estate, and hence was a bankruptcy proceeding proper.

Counsel cites *Dodge vs. Norlin*, 133 Fed., 363, decided by the Court of Appeals for the Eighth Circuit, as sustaining his contention. In that case that court took the position that a litigant desiring to secure a review by the Courts of Appeals in bankruptcy cases, could, at his option, either appeal to such courts, thus securing a review of the facts, or file a petition for revision therein, being only heard on questions of law; that if the facts were disputed, the proper method was by appeal, if undisputed, the proper method was by petition for revision.

That court stands alone in this construction of the law, and this court and all the other Courts of Appeals have held otherwise.

The holding in *Dodge vs. Norlin* is manifestly erro-

neous, and it is unnecessary to spend any time in its discussion.

Some other cases from the same circuit are cited by counsel on page 24 of his brief, in which this erroneous holding is carried out, and we think it unnecessary to discuss them in detail. We shall hurriedly discuss the other cases cited and show they are not in point.

Burleigh vs. Foreman (C. C. A., 1st Circuit), 125 Fed., 217.

This was a controversy between creditors of a copartnership and creditors of one of the partners. It was not such a matter as the case at bar. A precisely similar case to the case at bar was decided by the same court according to our contention and is cited in our original brief at page 10. *In re Worcester County,* 102 Fed., 808. In *Burleigh vs. Foreman*, no disposition is shown to overrule *In re Worcester County,* and the latter still stands.

Smith vs. Means (C. C. A., 7th Circuit), 148 Fed., 89.

In this case a claimant filed a petition of intervention claiming to be the owner of a steam shovel and asking for its possession. This case is very similar to *Hewit vs. Berlin Machine Works, supra,* and is not at all like the case at bar. Here, too, the court does not pretend to overrule the earlier cases decided by it of *In re Rouse, Hazard & Co.,* 91 Fed., 96, and *In re Cosmopolitan Power Co.,* 137 Fed., 858, cited on page 9 of our original brief, which are exactly similar to the case at bar.

Mason vs. Wolkowich (C. C. A., 1st Circuit), 150 Fed., 699.

In this case the trustee filed a petition claiming that one Mason had sold certain property belonging to the estate and held the money therefor, and asking that he be ordered to pay said money to the trustee. Mason answered admitting the receipt of the money, but alleging he had paid it over to the trustee's authorized agent. This clearly is not a similar case to the case at bar, and nowhere does the court intimate that it was dissatisfied with or wished to overrule its prior holding in *In re Worcester County, supra.*

Security Co. vs. Hand (C. C. A., 7th Circuit).

This case also is very similar to *Hewit vs. Berlin Machine Works, supra,* and announces the same principle. The Security Company filed a petition asserting its possession and control of certain merchandise and asking that the trustee be ordered to refrain from interfering with such possession. Here, also, Judge Baker, who also wrote the opinion in *Smith vs. Means,* manifests no intention of overruling the prior decisions of the same court.

Hinds vs. Moore (C. C. A., 6th Circuit), 134 Fed., 221.

In this case the trustee filed a petition claiming that one Hinds had fraududently gotten from him certain of the bankrupt's goods and asking that he be compelled to show cause why he should not account for their value. This case also is clearly dissimilar to the case at bar. Subsequently in three cases, similar to the case at bar, the same court decided according o our contention.

In re Mueller, 135 Fed., 711.
In re McMahon, 147 Fed., 684.

In re First Nat. Bank, 155 Fed., 100.
McCarty vs. Coffin (C. C. A., 5th Circuit), 150 Fed., 307.

This was a suit brought by the trustee to cancel a conveyance, a case entirely dissimilar to the case at bar. The court did not overrule its former holdings in

In re Whitener, 105 Fed., 180.
In re Abraham, 93 Fed., 767.

In *Hewit vs. Berlin Works,* and all cases cited in appellant's brief on the jurisdiction, the claimant in each instance set up a title to the property, an absolute ownership of the matter in controversy as against the trustee.

The issue thus joined is a question of ownership entirely independent of the "proceedings in bankruptcy." The controversy arises in the bankruptcy proceedings because the trustee makes claim to certain property as part of the bankrupt estate, which some third party, a stranger to the bankruptcy proceedings, also claims to own, but this controversy night just as well arise and be determined in any other court as the bankruptcy court. The bankruptcy court may, by consent of the parties, hear and determine the matter, but its jurisdiction in such matters is not exclusive. In the bankruptcy court, as in any other court, issue is joined on this question of ownership, and a controversy is pending, entirely independent of the administration of the estate, in fact on the result of this controversy depends whether the thing in controversy shall be administered as part of the estate or not.

The case at bar presents an entirely different question and falls within the rule laid down by Mr. Justice Holmes

in *Hutchinson vs. Otis, supra.* Claimant Arts made no claim to the property, possession of which had been taken by the trustee. Arts filed his claim with the trustee, recognized the title of the trustee, and suggested the priority of his lien or mortgage, just as the bankrupt himself might in the proceedings in bankruptcy suggest his homestead rights or exemptions.

There is no dispute as to his claim. His lien under the bankrupt act is a valid one and is allowed as the trustee proceeds to administer the estate or is held invalid and rejected.

The aggrieved party, be he trustee or claimant, seeks a review of the allowance or rejection of the lien. Surely this is such a matter involving the administration of the estate and the interpretation of the bankrupt act as should be reached by petition for review, and not by appeal. The allowance or rejection of the lien is an incident arising in the proceedings in bankruptcy, and there is no controversy distinguished from this. In such cases as the Hewit-Berlin case there is a dispute as to title; in such cases as the case at bar a dispute involving the interpretation of the bankruptcy law as applied in the proceedings in bankruptcy.

We think we have clearly shown that *Hewit vs. Berlin Works*, and the other cases cited by counsel, are not authority for the position he has taken. Counsel says he can see no difference between the Hewit case and the case at bar. We think there is a wide difference between the case of a person, a stranger to the bankruptcy proceeding and desiring to remain such stranger, coming voluntarily into the bankruptcy court, asserting title to property also

claimed by the trustee and asking the bankruptcy courts to determine such controversy by virtue of its power to hear and determine controversies arising in bankruptcy proceedings, as in the Hewit case, and the case of a creditor of the bankrupt filing a claim against the estate in due course of the bankruptcy proceedings looking to a settlement of the estate, accompanied by a statement, as required by the bankrupt act, that it is a preferred claim, secured by mortgage on certain property of the estate held by the trustee, as in the case at bar. In the latter case it became the duty of the trustee, in the settlement of the estate, to investigate and determine whether the claim actually was a preferred claim, and if on investigation it so appeared, it would be his duty to list it as a preferred claim and pay it first from the proceeds of the sale of the mortgaged property. If uncertain, it would be his duty to leave it, as in this case, to the determination of the bankruptcy court, and that court would determine the matter on the evidence purely as a bankruptcy proceeding or step in bankruptcy in connection with the settlement of the estate.

It thus appears that there is a difference between the Hewit case and the case at bar, and the Hewit case is not authority for this appeal, nor are any of the other cases cited in point, as above shown.

As against this lack of authority to sustain counsel's contention, we cite *Hutchinson vs. Otis,* decided by this court, a case "on all fours" as to the facts with the case at bar, and which we contend is decisive of the question. In addition we refer to the many decisions of the various Circuit Courts of Appeals listed on page 9 of our original

brief, in all of which the *exact point* now under discussion was considered and determined according to our present contention.

If counsel's claim is correct and there is of right an appeal to this court herein, it cannot but result in adding greatly to the labors of an already overburdened court, and this is an important thing to consider in determining the intent of Congress. The creation of the Courts of Appeals was admittedly for the purpose of relieving the burdens of this court, and ever since Congress has made provision for review of litigation in this court only in cases of much importance and gravity. It cannot be presumed that in this instance Congress intended to give litigants an appeal to this court as of right in such matters as this, matters involving merely the validity of a mortgage or other lien given by the bankrupt. Looked at from any standpoint, and under the unanimous holdings of the courts, the appeal herein was not allowable and should be dismissed.

II.

Assuming that there is a right of appeal in this case under Section 24a of the bankrupt act, as appellant now claims, and that the appeal was not attempted under Section 25a, still the appeal should be dismissed because the record in this court is not in such shape that the appeal can be considered.

Appellant has not brought to this court a complete transcript of the record herein, including the evidence, as contemplated by Section 24a, but has prosecuted this

appeal as if taken under clause "b" of Section 25a. Said clause "b" is as follows:

> "b. From any final decision of a Court of Appeals, allowing or rejecting a claim under this act, an appeal may be had *under such rules* and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other, etc."

In accordance with such authority this court promulgated General Orders in Bankruptcy XXXVI, Clause 3, as follows:

> "3. In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusion of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the findings of fact, and the conclusions of law."

It is manifest that this rule only applies to appeals taken under clause "b" of Section 25a of the bankruptcy act, because it is only in connection with such appeals that this court is given jurisdiction to prescribe the rules under which appeals may be taken to it. Clearly the authority to prescribe rules for appeal does not apply to Section 24a, granting "appellate jurisdiction of controversies arising in bankruptcy proceedings," and in appeals thereunder the whole record must be brought up, as in "other cases," that is, cases not arising in bankruptcy proceedings. Appellant

has not done this, has not furnished this court with a certified transcript of the whole record in the court below, and the appeal should be dismissed.

Respectfully submitted,

GEORGE S. WRIGHT,

ROBERT E. O'HANLY,

Attorneys for Appellee.